MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-18 ta' Settembru, 2024

Appell Inferjuri Numru 114/2023 LM

Polidano Brothers Limited (C 8884)
('is-soċjetà appellata')

vs.

Shoreline Contracting Limited (C 83994)
('is-soċjetà appellanta')

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà intimata **Shoreline Contracting Limited (C 83994)** [minn issa 'l quddiem 'is-soċjetà appellanta'], mil-lodo arbitrali mogħti fis-27 ta' Ottubru, 2023 [hawnhekk 'id-deċiżjoni appellata'] mit-Tribunal ta' arbitraġġ fi ħdan iċ-Ċentru Malti għall-Arbitraġġ [minn issa 'l

quddiem 'it-Tribunal'], fejn it-Tribunal iddeċieda t-talbiet tas-soċjetà rikorrenti **Polidano Brothers Limited (C 8884)** [minn issa 'l quddiem 'is-soċjetà appellata'], kontra s-soċjetà intimata, kif ġej:

"*Based on the above, the Tribunal finds as follows:*

(a) PBL's claim (c) to be justified limitedly in the amount of €257,176.99 being the claim in question (€550,186.99) less the following:

a. €104,570 in respect of excavation works;
b. €12,723 in respect of preliminaries;
c. €5,470 in respect of dayworks;
d. €168,188 in respect of excavation below mean sea level; and
e. €2,000 in respect of mesh

and, hence, orders SCL to pay PBL the amount of €257,176.99 in respect of the said claim, such payment to be effected by set-off against the amount due to SCL in terms of finding (e) below, with the balance in cash or cash equivalent.

(b) PBL's claim for the release of the performance security justified, with SCL hereby ordered to release the security to PBL;
(c) PBL's claims (e), (f), (g) and (h) unjustified, and therefore rejected;
(d) PBL's claim (i) for interest to the date of effective payment, justified and SLC ordered to pay same to PBL;
(e) SCL's counter-claim in the amount of €2,028,349.00 justified limitedly to the following:
(i) €247,437.00 representing the estimated costs for the rectification of the vertical over-excavation; and
(ii) €5,000.00 representing delay costs

And, hence, orders PBL to pay SCL the amount of €252,437.00 in respect of the said claim, such payment to be effected by set-off against the amount due to PBL in terms of finding (a) above.

(f) The Tribunal sees no justification for the declaration as sought by PBL at paras (a) and (b) of its claim and abstains from considering same.
(g) Costs, as per Taxed Bill of Costs Issued by the Malta Arbitration Centre and which is being attached hereto and marked Document X, are to be apportioned as follows: the claim shall be paid as to 50% by each of the Parties; and the counter-claim shall be paid for by SCL as to 80% and PBL as to 20%."

Fatti

2. Fit-talba tagħha, is-soċjetà rikorrenti spjegat li hija kienet daħlet f'Bulk Excavation Agreement – SCL/1020 mas-soċjetà intimata fis-7 ta' Frar, 2019 [minn issa 'il quddiem 'il-Kuntratt'], u sussegwentement ġew iffirmati wkoll żewġ *addenda* – wieħed fis-7 ta' Frar, 2019, u ieħor fit-28 ta' Frar, 2019, li permezz tagħhom is-soċjetà rikorrenti qablet li tagħmel xogħol ta' skavar fiż-żona madwar is-Shoreline Development Plots P3 u P4, Smart City, il-Kalkara għal-livelli meħtieġa, u sabiex sussegwentement telimina miż-żona l-materjal kollu skavat minnha. Is-soċjetà rikorrenti aġixxiet *ai termini* tal-imsemmi Kuntratt sabiex titħallas ammont ta' flus li hija jidhrilha li huwa dovut lilha, għar-rilaxx tal-garanzija tal-prestazzjoni tal-Kuntratt, u għall-ħlas ta' danni sofferti fl-inġenji użati minnha, hekk kif dawn l-inġenji komplew jintużaw minkejja li kien hemm ingress kontinwu ta' ilmijiet, kuntrarjament għall-assigurazzjonijiet li ngħataw mis-soċjetà intimata li dan ma kienx ser iseħħ. Is-soċjetà rikorrenti spjegat li l-ammont pretiż minnha jammonta għal ħames mija u ħamsin elf, mija u sitta u tmenin elf Euro u disgħa u disgħin ċenteżmu (€550,186.99) flimkien mal-imgħaxijiet kummerċjali, ir-rilaxx tal-garanzija għall-ammont ta' mitejn u tmintax-il elf, mitejn u sitta u tmenin Euro (€218,286), il-kwantifikazzjoni u l-ħlas tad-danni sofferti fl-inġenji tagħha, u kif ukoll għall-ħlas tal-ispejjeż legali u ġudizzjarji nkorsi minnha.

3. In vista ta' dan, is-soċjetà rikorrenti talbet lit-Tribunal: (i) jiddikjara li hija eżegwiet l-obbligi tagħha *ai termini* tal-Kuntratt bejn il-partijiet u skont kif mitlub mis-soċjetà intimata; (ii) jiddikjara li s-soċjetà intimata naqset milli tħallas lis-soċjetà rikorrenti l-konsiderazzjoni kkontemplata fil-Kuntratt mal-

eżekuzzjoni tax-xogħlijiet; (iii) jordna lis-soċjetà intimata tħallas favur is-soċjetà rikorrenti l-konsiderazzjoni dovuta skont il-Kuntratt, li tammonta għal ħames mija u ħamsin elf, mija u sitta u tmenin Euro u disgħa u disgħin ċenteżmu (€550,186.99); (iv) jordna lis-soċjetà intimata tirrilaxxa l-garanzija għall-prestazzjoni tal-obbligi stipulati fil-Kuntratt; (v) jiddikjara li s-soċjetà rikorrenti sofriet ħsara fuq inġenji tagħha minħabba li x-xogħol ta' skavar sar f'ilma fond, u dan minkejja l-assigurazzjonijiet li ngħatat mis-soċjetà intimata li din is-sitwazzjoni ma kienitx ser isseħħ; (vi) jikkwantifika d-danni sofferti minnha fuq l-inġenji tagħha minħabba f'din is-sitwazzjoni; (vii) jikkundanna lis-soċjetà intimata tħallas id-danni hekk likwidati; (viii) jordna lis-soċjetà intimata tagħmel tajjeb għall-ispejjeż relatati ma' dawn il-proċeduri ta' arbitraġġ.

4. Min-naħa tagħha s-soċjetà intimata wieġbet li huwa minnu li l-partijiet iffirmaw il-Kuntratt, li permezz tiegħu s-soċjetà rikorrenti kellha teżegwixxi x-xogħlijiet elenkati fil-Kuntratt fiż-żmien hemmhekk stipulat. Qalet li s-soċjetà rikorrenti ma onoratx it-terminu ta' żmien stipulat fil-Kuntratt, u għalhekk, wara li kien hemm komunikazzjoni fit-tul bejn il-partijiet li ma wasslitx għar-riżoluzzjoni tat-tilwima bejniethom, hija kienet kostretta tibgħat '*Notice of Default*' lis-soċjetà rikorrenti fis-17 ta' Frar, 2021 *ai termini* tal-klawsola 12.1 tal-Kuntratt. Qalet li minkejja dan, is-soċjetà rikorrenti naqset milli tirrimedja n-nuqqasijiet hemm imsemmija, u konsegwentement is-soċjetà intimata ma kellha l-ebda għażla għajr li tibgħat tinforma lir-rikorrenti li kienet ser tittermina l-Kuntratt, u dan permezz ta' ittra tal-24 ta' Marzu, 2021. Is-soċjetà intimata qalet li hija nterpellat lis-soċjetà rikorrenti sabiex tersaq għall-ħlas tal-ammont ta' miljun, tmien mija u sebgħa u tletin elf, disa' mija u tnejn u disgħin Euro u

sittin ċenteżmu (€1,837,992.60) rappreżentanti l-bilanċ dovut mis-soċjetà rikorrenti lis-soċjetà intimata wara t-tnaqqis tal-garanzija għall-prestazzjoni ammontanti għal mitejn u tmintax-il elf, mitejn u sitta u tmenin Euro (€218,286) u l-ammont dovut lis-soċjetà rikorrenti ammontanti għal mitejn u tnejn u ħamsin elf, u sebgħin Euro u erbgħin ċenteżmu (€252,070.40). Spjegat li hija għandha tirċievi l-ammont ta' tliet mija u sitta u ħamsin elf u sebgħa u tletin Euro (€356,037) rappreżentanti l-istima tal-ispiża għax-xogħol ta' rettifika li kellu jsir minnha sabiex ġew indirizzati kwistjonijiet dwar skavar żejjed li sar fis-sit; l-ammont ta' mitejn u sebgħa u tletin elf, tliet mija u tnax-il Euro (€237,312) rappreżentanti l-ispiża stmata għat-tneħħija tal-materjali żejda li nġabu fis-sit; u miljun, seba' mija u ħmistax-il elf Euro (€1,715,000) rappreżentanti d-danni in konnessjoni mad-dewmien ikkalkulati bir-rata ta' ħamest elef Euro (€5,000) għal kull ġurnata ta' dewmien, fuq medda ta' tliet mija u tlieta u erbgħin (343) jum. Is-soċjetà intimata spjegat li s-soċjetà rikorrenti ma riditx tirrikonoxxi li kien hemm dawn in-nuqqasijiet min-naħa tagħha in konnessjoni mal-eżekuzzjoni tax-xogħlijiet, u għalhekk ċaħdet it-talbiet tas-soċjetà rikorrenti. Qalet li in vista ta' dan kollu, hija mhux talli m'għandha tħallas xejn lis-soċjetà rikorrenti, iżda talli hemm dovuti lilha ammonti, u għal dan il-għan ser tkun qiegħda tressaq kontro-talba għaliex fil-fehma tagħha kwalsiasi ammont pretiż mis-soċjetà rikorrenti għandu jiġi ssaldat mal-ammonti li għandhom jitħallsu lilha. Qalet ukoll li l-allegazzjoni li hija għandha tinżamm responsabbli għall-ħsarat ikkawżati lill-inġenji tas-soċjetà rikorrenti, hija infondata fil-fatt u fid-dritt, u għandha tiġi miċħuda.

5. Is-soċjetà intimata qalet li hija ma taqbilx mal-ammont ikkalkulat mis-*surveyors* tas-soċjetà rikorrenti, liema ammont din tal-aħħar qiegħda tippretendi li għandu jitħallas lilha mis-soċjetà intimata. Qalet li l-ammont iċċertifikat mill-Inġinier *ai termini* tal-Kuntratt, huwa ta' mitejn u tnejn u ħamsin elf, u sebgħin Euro u erbgħin ċenteżmu (€252,070.40), liema ammont għandu jiġi ssaldat ma' kwalsiasi ammont li għandu jirriżulta li huwa dovut liha. Qalet ukoll li hija għandha jedd iżżomm il-garanzija tal-prestazzjoni (*Performance Security*) minħabba fin-nuqqasijiet tas-soċjetà rikorrenti, imma hija kienet għadha ma talbitx li tiġbed il-garanzija tal-prestazzjoni tas-soċjetà rikorrenti, minkejja li qed tirriserva li tagħmel dan jekk ikun meħtieġ, jew f'każ li s-soċjetà rikorrenti tonqos li ġġedded l-imsemmija garanzija qabel tiskadi. Is-soċjetà intimata qalet ukoll li hija m'għandiex tinżamm responsabbli għal danni fuq l-inġenji tas-soċjetà rikorrenti. Is-soċjetà intimata talbet lit-Tribunal: (i) jiċħad it-talba tas-soċjetà rikorrenti sabiex jiġi ddikjarat li hija eżegwiet l-obbligi tagħha taħt il-Kuntratt u skont it-termini u kundizzjonijiet elenkati fil-Kuntratt; (ii) jiċħad it-talba tas-soċjetà rikorrenti sabiex jiġi ddikjarat li kull ammont iċċertifikat li s-soċjetà rikorrenti tista' tkun intitolata għalih għal xogħol eżegwit minnha jiġi ssaldat ma' ammont ekwivalenti mit-total li għandu jirriżulta li huwa dovut lis-soċjetà intimata bħala riżultat tal-kontro-talba mressqa minnha; (iii) jiċħad it-talba tas-soċjetà rikorrenti sabiex is-soċjetà intimata tkun ikkundannata tersaq għall-ħlas tal-ammont ta' ħames mija u ħamsin elf, mija u sitta u tmenin Euro u disgħa u disgħin ċenteżmu (€550,186.99); (iv) jiċħad it-talba tas-soċjetà rikorrenti għar-rilaxx tal-garanzija għall-prestazzjoni; (v) tiċħad it-talba tas-soċjetà rikorrenti sabiex is-soċjetà intimata tinżamm responsabbli għal xi danni allegatament ikkawżati lill-inġenji tas-soċjetà rikorrenti fix-xogħlijiet ippreparati

minnha; u (vi) tiċħad it-talba tas-soċjetà rikorrenti sabiex is-soċjetà intimata tagħmel tajjeb għall-ispejjeż ta' dawn il-proċeduri ta' arbitraġġ.

6. Fil-kontro-talba tagħha, is-soċjetà intimata spjegat li l-partijiet kienu ffirmaw Kuntratt bejniethom, li bis-saħħa tiegħu s-soċjetà rikorrenti kellha teżegwixxi xogħlijiet entro t-terminu maqbul mill-partijiet fil-Kuntratt. Is-soċjetà intimata spjegat li s-soċjetà rikorrenti aġixxiet b'negliġenza, b'imprudenza, b'imperizja u b'nuqqas ta' ħila fl-eżekuzzjoni tal-obbligi tagħha, u skavat aktar milli kellha tiskava, fil-linja vertikali kif ukoll f'dik orizzontali, bir-riżultat li sar xogħol ta' skavar fl-art adjaċenti li tappartjeni lil terzi, SmartCity (Malta) Limited. Is-soċjetà intimata spjegat li s-soċjetà rikorrenti ppruvat tikkoreġi dan in-nuqqas billi impurtat materjal sabiex timla s-sit sal-livelli miftiehma, iżda dan sar b'negliġenza, b'imperizja, b'nuqqas ta' ħila u attenzjoni, u bir-riżultat li fuq is-sit ġie ddepożitat aktar materjal milli kien meħtieġ, u għalhekk dan kellu jitneħħa. Is-soċjetà intimata qalet li s-soċjetà rikorrenti rrifjutat li tagħmel ix-xogħol rimedjali meħtieġ, u għalhekk hija ma kellha l-ebda għażla għajr li tingaġġa kuntrattur ieħor biex jeżegwixxi dan ix-xogħol. Qalet li l-ispiża għat-tneħħija u għar-rimi tal-materjal in kwistjoni, swiet mitejn u sebgħa u tletin elf, tliet mija u tnax-il Euro (€237,312.00). Is-soċjetà intimata spjegat li fir-rigward tax-xogħol li sar fil-linja orizzontali, is-soċjetà rikorrenti naqset milli tagħmel ix-xogħol rimedjali meħtieġ, u l-ispiża relatata mar-ripristinar tal-art li tappartjeni lis-soċjetà SmartCity (Malta) Limited, hija ta' tliet mija u sitta u ħamsin elf, u sebgħa u tletin Euro (€356,037). B'żieda ma' dan, is-soċjetà intimata qalet li s-soċjetà rikorrenti naqset milli tonora t-terminu ta' żmien impost fuqha fil-Kuntratt għat-tlestija tax-xogħol maqbul, u kien hemm tliet mija u tnejn u erbgħin (342)

ġurnata ta' dewmien min-naħa tas-soċjetà rikorrenti, għal liema dewmien kellu jkun hemm penali ta' ħamest elef Euro (€5,000) għal kull ġurnata ta' dewmien skont il-Kuntratt. Is-soċjetà intimata qalet li għalhekk il-penali għad-dewmien tammonta għal miljun, seba' mija u ħmistax-il elf Euro (€1,715,000), u għalhekk għandu jirriżulta li hemm bilanċ ta' żewġ miljuni, tliet mija u tmint elef, tliet mija u disgħa u erbgħin Euro (€2,308,349) dovuti lilha mis-soċjetà rikorrenti.

7. In vista ta' dan, is-soċjetà intimata talbet lit-Tribunal: (i) jiddikjara li s-soċjetà rikorrenti hija responsabbli għal xogħol ta' skavar żejjed li sar fis-sit, u li konsegwentement din għandha tinżamm responsabbli għax-xogħol rimedjali meħtieġ sabiex tiġi indirizzata l-problema tal-iskavar żejjed li sar; (ii) jillikwida l-ammont dovut lis-soċjetà intimata mis-soċjetà rikorrenti in konnessjoni max-xogħlijiet rimedjali li kellhom isiru fuq is-sit, liema xogħlijiet jammontaw għal tliet mija u sitta u ħamsin elf, u sebgħa u tletin Euro (€356,037.00), jew kull ammont verjuri li jista' jiġi likwidat mit-Tribunal; (iii) jordna lis-soċjetà rikorrenti tħallas lis-soċjetà intimata l-ammont hekk likwidat fir-rigward tax-xogħlijiet rimedjali meħtieġa; (iv) jiddikjara li s-soċjetà rikorrenti hija responsabbli għall-importazzjoni żejda ta' materjali fuq is-sit, u li konsegwentement hija għandha tinżamm responsabbli għall-ispiża relatata mat-tneħħija tal-materjal żejjed impurtat; (v) jillikwida l-ammont dovut lis-soċjetà intimata mis-soċjetà rikorrenti fir-rigward tat-tneħħija tal-materjali żejda impurtati fl-ammont ta' mitejn u sebgħa u tletin elf, tliet mija u tnax-il Euro (€237,312), jew kull ammont ieħor li t-Tribunal jista' jqis li huwa xieraq u opportun; (vi) jordna lis-soċjetà rikorrenti tħallas lill-intimata l-ammont hekk likwidat sabiex tiġi indirizzata l-problema tal-importazzjoni żejda ta' materjal fuq is-sit; (vii) jiddikjara li s-soċjetà

rikorrenti naqset milli teżegwixxi x-xogħol ikkontemplat fil-Kuntratt fiż-żmien stipulat, u konsegwentement tiddikjara li s-soċjetà rikorrenti għandha tħallas id-danni likwidati skont it-termini tal-Kuntratt; (viii) tillikwida d-danni minħabba d-dewmien fl-ammont ta' miljun, seba' mija u ħmistax-il elf Euro (€1,715,000), bir-rata ta' ħamest elef Euro (€5,000) għal kull ġurnata ta' dewmien fuq perijodu ta' tliet mija u tlieta u erbgħin (343) jum; (ix) jordna lis-soċjetà rikorrenti tħallas id-danni hekk likwidati lis-soċjetà intimata.

8. Is-soċjetà rikorrenti wieġbet għall-kontro-talba tas-soċjetà rikorrenti billi qalet li hija ntalbet teżegwixxi xi xogħlijiet mis-soċjetà intimata *ai termini* tal-Kuntratt, u skont l-istruzzjonijiet li ngħatat mis-soċjetà intimata. Qalet li hija kompliet tippresta s-servizzi tagħha u teżegwixxi x-xogħol, minkejja li ħlasijiet dovuti lilha perjodikament mis-soċjetà intimata minn żmien għal żmien, ma bdewx jitħallsu. Is-soċjetà rikorrenti spjegat li fix-xhur qabel ma ġew istitwiti dawn il-proċeduri ta' arbitraġġ, is-soċjetà intimata bdiet tirrifjuta li tħallas l-ammonti dovuti minnha, u bdiet toħloq skużi li huma kollha infondati fil-fatt u fid-dritt, sabiex tipprova tiġġustifika n-nuqqas tagħha li tħallas. Is-soċjetà rikorrenti qalet ukoll li s-soċjetà intimata bdiet tallega li s-soċjetà rikorrenti skavat aktar materjal milli suppost, u dan minkejja li s-soċjetà rikorrenti eżegwiet ix-xogħol skont l-istruzzjonijiet mogħtija bil-miktub mill-periti u mill-esperti l-oħra inkarigati mis-soċjetà intimata. Qalet ukoll li d-danni pretiżi mis-soċjetà intimata in konnessjoni mal-allegat dewmien għat-tlestija tal-proġett fl-ammont ta' €1,715,000, huwa ammont li mhuwiex ġustifikat, għaliex ix-xogħol ta' skavar stiplat fil-Kuntratt kien ilu lest għal aktar minn sena, u d-danni pretiżi huma f'ammont kważi ekwivalenti għall-valur tal-proġett kollu kemm hu, billi l-

proġett kollu kien ikkuntrattat għal żewġ miljuni, mija u tnejn u tmenin elf, tmien mija u tlieta u sittin Euro (€2,182,863), li minnhom huwa dovut biss l-ammont mitlub minnha fil-proċeduri ta' arbitraġġ istitwiti minnha. Is-soċjetà rikorrenti qalet li huwa ċar li s-soċjetà intimata qiegħda tallega li kien hemm dewmien min-naħa tas-soċjetà rikorrenti, mhux għaliex is-soċjetà rikorrenti naqset milli teżegwixxi x-xogħol jew milli teżegwieh fit-terminu preskritt, iżda għaliex skont is-soċjetà intimata, is-soċjetà rikorrenti naqset milli ssegwi l-istruzzjonijiet li ngħatat fuq ix-xogħol rimedjali meħtieġ, u dan meta x-xogħol rimedjali meħtieġ ma kienx meħtieġ minħabba xi nuqqas tas-soċjetà rikorrenti. Is-soċjetà rikorrenti qalet li l-allegazzjonijiet li saru mis-soċjetà intimata huma biss *arm-twisting techniques* u strateġiji frivoli min-naħa tas-soċjetà intimata, sabiex ittawwal iż-żmien li fih hija tintalab tonora l-obbligi tagħha, u dan meta s-soċjetà rikorrenti wettqet ix-xogħol mitlub minnha b'mod sħiħ, fil-ħin u b'mod professjonali, kif mitlub mis-soċjetà intimata. Qalet li għalhekk il-kontro-talbiet tas-soċjetà intimata huma infondati fil-fatt u fid-dritt, u għandhom jiġu miċħuda.

Il-lodo arbitrali appellat

9. Permezz tal-lodi arbitrali mogħti fis-27 ta' Ottubru, 2023, it-Tribunal iddeċieda t-talbiet tas-soċjetà rikorrenti u l-kontro-talba tas-soċjetà intimata wara li għamel is-segwenti konsiderazzjonijiet:

> *"Introduction*
>
> *1. The Parties entered into a contract of works in terms of which PBL was to excavate two plots at what is known as the Shoreline Development Plots, forming part of SmartCity, Ricasoli, Kalkara. This dispute arose mainly because the site was over-*

excavated, both vertically and horizontally. This is a fact which is not contested. The Parties blame each other for the over-excavation and, of course, for the consequences which, directly and indirectly, flowed from it.

<u>The claims and the counter-claims</u>

This arbitration was commenced by means of a Notice of Arbitration filed by PBL against SCL at the Malta Arbitration Centre (the "Centre") on 21 October 2021. In both the Notice of Arbitration and in the Statement of Claim reference was made to the contract of works agreement referred to as the Bulk Excavation Agreement (SCL/1020) dated 7th February 2019 together with Contract Addendum 1 dated 7th February 2019 and Contract Addendum 2 dated 28th February 2019 (collectively referred to as the "Contract"). In terms of the Contract PBL had to excavate the area situated at Shoreline Development Plots P3 and P4, SmartCity Ricasoli, Kalkara, Malta (the "Site") to the required levels and to clear and cart away all demolition and excavation materials.

3. In the Notice of Arbitration, PBL described the nature of the claim in the following terms:

> "[PBL] is claiming from SCL an amount due by the same Respondent, in terms of the Contract, the release of the performance security guarantee and the payment of damages as suffered by PBL to its equipment, since such equipment had to be used to carry out the excavation works notwithstanding the continuous seepage of sea water contrary to SCL's assertions that such a situation would not occur and for which Respondent rendered itself responsible."

4. Also in the Notice of Arbitration, PBL stated that the amount involved related to the payment of an outstanding sum of €550,186.99 together with commercial interest, the release of the performance security in the amount of €218,286, quantification and payment of damages to equipment and all legal and judicial fees and commercial interest.

5. The relief or remedy sought by PBL (as substantively set out both in the Notice of Arbitration and in the Statement of Claim) is the following:

a. A declaration that PBL has executed the Contract as per agreement and as instructed by SCL and/or SCL's consultants;
b. A declaration that SCL has failed to pay PBL theconsideration contemplated in the Contract on the execution of works carriedout by PBL;
c. A declaration ordering SCL to settle in favour of PBL the consideration due in pursuance of the Contract and amounting to €550,186.99 in terms of the Contract;
d. A declaration ordering SCL to release the Performance Security;
e. A declaration that PBL suffered damages to its equipment whilst carrying out the works since it had to carry out the excavation works in knee-

depth levels of sea-water, contrary to SCL's assertions that such a situation was not to occur, thereby rendering SCL responsible for these damages;

f. A declaration that SCL is responsible for these damages;

g. Quantification of damages referred in (e) above;

h. A declaration ordering SCL to pay such damages, as may be quantified by experts;

i. A final decision ordering SCL to fully bear the costs of arbitration as set out in Article 50 of Chapter 387 of the laws of Malta, and commercial interest to the day of effective payment.

6. In its Statement of Defence and Counter-Claim, both received by the Centre on 14 December 2021, SCL advanced the following defences and counter-claims:

a. *it disagreed with the amount calculated by PBL's surveyors and indicated in the Statement of Claim. According to SCL, the amount certified by the Engineer in terms of the Contract was of €252,070.40, which amount should be set off against an equivalent amount from the total that will result due to SCL (in terms of its counter-claim);*
b. *SCL is within its rights at law to call upon the Performance Security in view of PBL's defaults;*
c. *SCL cannot be held responsible for PBL's claim for damages to its equipment;*
d. *SCL is claiming an amount due by PBL as a direct result of PBL's breach of the terms and conditions of the Contract, including but not limited to the over-excavation of the site by PBL, PBL's failure to remove over-imported materials from the Site and the delay damages due by PBL to SCL. SCL quantifies its counter-claim at circa €2,038,349, which amount represents the following:*

    1. *€356,037 representing the estimated cost for the rectification works required in order to address the issues related to the over-excavation of the site;*
    2. *€237,312 representing the costs for the removal of the over-imported materials; and*
    3. *€1,715,000 representing the delay damages due by PBL to SCL calculated at the stipulated rate of €5,000 per day for a total of 343 days of delay.*

7. Substantively, therefore, SCL requested this Tribunal to reject PBL's claims as advanced (saving PBL's right to payment of the certified amount for works performed, with payment to be effected by way of set-off against the amounts due to SCL pursuant to the counter-claims); to declare PBL liable to settle the counter-claims; to quantify same in the amounts set out in para. 6 and to order PBL to pay the amounts so liquidated to SCL (after the said set-off).

8. Following notice given to the undersigned, by letter dated 5 November 2021 from the Centre, of his appointment as arbitrator in this matter, a procedural conference

was held virtually on 25 January 2022 and Procedural Order No. 1, including a timetable, was issued thereafter, on 17 February 2022. The Parties' evidence was produced largely in line with the time-table.

9. Trial hearings were held and recordings of the hearings and, later, transcripts of the same were duly circulated to the Parties.

10. Post-hearing briefs were submitted contemporaneously by the Parties on 31 July 2023, supplemented by briefs (or notes) exchanged on 29 September 2023. Final oral argument was heard on 12 and 13 September 2023 and the proceedings were declared closed immediately at the end of those hearings (subject to the filing of the said additional briefs or notes).

Horizontal over-excavation

11. On 17 December 2019 the Parties agreed that an error had been made by SCL's surveyors in the transposition of a datum point. This resulted in an horizontal over-excavation of the Site and, for some time, the conduct of excavation works with a significant amount of seawater on the Site.

12. It is undisputed that the original error is attributable to SCL in that it was made by the surveyor that was engaged by SCL to survey the Site. It was discovered by PBL when a voluminous amount of water, later found to be seawater, was entering the Site.

13. Arising directly from this issue are (i) PBL's claim, disputed by SCL, for €168,188 as extra costs related to excavation below the level of the sea; and (ii) €55,243.86 as damages to equipment used under seawater.

14. SCL's position is, in brief, that PBL had to verify the 'data related to the site' *including, the transposition of the datum point from the relevant marker made available by the Planning Authority onto the Site. In this regard, SCL pointed to the following from the Contract: (i) Part 4, Employers Requirements: "Keeping Site Dry" (at p. 21); (ii) Part 4, Employers Requirements: "Topography" (at p. 30); (iii) Part 4, Employers Requirements: "Setting-Out Dimensions and Levels" (at p. 30); (iv) Part 4, Employers Requirements: "Drying Out the Works" (at p. 34); (v) Part 4, Bill of Quantities, point A.05; and (vi) Part 4, Bill of Quantities, point B.11.*

15. SCL makes its case in the following terms:

> It is evident from the above-quoted extracts that whilst the Employer had an obligation to provide an initial survey, it was the Contractor's responsibility to verify said survey and to ascertain the datum points and other levels. Consequently, whilst in the spirit of compromise QP had determined that the cost for the excavation of additional volumes should be divided in equal parts between SCL and PBL which was factored into the amounts certified by QP, PBL cannot claim that

> SCL is solely responsible for the excavation that took place below the sea-level.

16. PBL argues that it is abundantly clear that excavation was never intended to extend below sea-level. Further, PBL contends that whilst it is true that it, as the contractor, 'was required to ensure that information (importantly, <u>about dimensions and levels</u>) is correct' *it relied on Prof Torpiano's evidence to maintain that*

> **it is not the norm for this obligation to extend to verifying the benchmarks which are given by the employer, or its agents at the outset**. The benchmarks are, after all, simply agreed markers, against which all measurements of levels and dimensions, have to be made. **Also according to Profs Torpiano, there was no way for PBL to pick up the fact that the benchmark information, provided by the Planning Authority, had been incorrectly transposed to the all-important drawings on the basis of which all measurements were to be made**.

17. PBL goes on to argue as follows:

> When reading the Employer Requirements, specifically with reference to the topographical site survey, carried out by Matsurv, with details and drawings by SCL, where it is said that "The Contractor shall be responsible to verify the accuracy of the data given in the topographical survey and should inform the Project Manager of any discrepancy before the commencement of any works."*(page 30 of the said Requirements),* ***clearly the data here refers to*** **"dimensions, setting out and site levels, whether spot or contour" referred to on the same page of the Employer Requirements under 'SETTING-OUTDIMENSIONS AND LEVELS' and <u>NOT to the benchmarks transposed by Matsurv</u>. As a matter of fact, under the same sub-heading, PBL was "responsible for the true and proper setting out of the Works and for accuracy of the positions, levels, grades, dimensions and alignment of all part of the Works." and therefore NOT for checking the benchmarks, provided by Matsurv.**

18. PBL affirms that this is exactly what it did:

> **This is what PBL's surveyors, especially in the person of Antoine Curmi, did, after PBL received the benchmark and took care of the setting out that was necessary for the Works that were eventually carried without any issue but for the excavation happening below mean sea level which resulted in continuous and voluminous ingress of seawater at a below sea level <u>that is radically different from ingress of seawater when excavation takes place close to the</u>**

> **mean sea level and which may and may not occur, depending on tidal action.** On the other hand, as far the excavated volumes were concerned there was/is no issue at all so much so that there was agreement between the respective surveyors of PBL and SCL thereon, as confirmed by Antoine Curmi. In his affidavit, the said Antoine Curmi explains his direct involvement at this juncture of the project in question.

19. PBL bolsters its argument in this regard by also referring to the fact that meetings appear to have been held between the Parties' respective surveyors on or around 29 April 2019 and early in May 2019 to coordinate the site surveys. Antoine Curmi explains the process as it happened in his affidavit. It does not appear that there is any material factual dispute in this regard.

20. Mr Curmi explains that SCL's surveyors showed him the three (or at least three) stations that they had prepared on the Site. He explained that these were clearly marked and were required in order (inter alia) to perform what he calls the process of setting out. After explaining where and how the stations were marked (by means of nails on the Site and as x, y and z coordinates on the plans sent to him) he goes on to say that he was not engaged to confirm

> il-korrettezza tal-valur tal-livell tal-istations, għaliex apparti illi l-Matsurv & Associates kienet diġà ħadet survey tal-art li kellha titqatta', hi kellha ukoll ir-responsabbilità sabiex tikkordina mal-awtoritajiet relattivi rigward il-coordinates ta' kull punt u l-għoli tagħhom.

21. He further explains that:

> L-iskop ta' dawn l-istations (referenzi) u l-co-ordinates relattivi huwa dejjem li jiggwidaw lill-kuntrattur u s-surveyor tiegħu, primarjament f'dan il-każ il-fond ta' tqattiegħ.
>
> Irrid ngħid illi jekk kien hemm żball fir-survey tal-klijent rigward il-livell tal-istations (referenzi) dan qatt ma stajt ninduna bih. Primarjament għaliex huwa dejjem kompitu tal-klijent li jara li jagħmel il-verifiki mal-awtoritajiet konċernati, sabiex iġib il-livell sew.
>
> Xogħli kien kelli nikkonferma li s-survey li tawni kien tajjeb b'tali mod illi l-valuri l-oħra jikkorrispondu mal-valuri tal-istations (referenzi) li ġew ippreżentati lili.

22. Mr Curmi then goes on to explain that he subsequently went on Site alone, prepared his own survey, the purpose of which was

> … illi jiena nikkonferma illi l-livelli li ħadu huma (dejjem marbutin mal-valur tal-istations li jkunu ħadu oriġinarjament), huma korretti.

23. Mr Curmi's survey was sent to Mr Attard Trevisan of Matsurv and the two tallied.

24. Before turning to the Contract, the Tribunal must address two arguments advanced by PBL which imply that PBL's case on this aspect of the dispute must be upheld whatever the Contract says.

25. The first argument is that there is a market practice which must be considered. Mr Curmi and Professor Torpiano testified to the effect that the practice in the market is for the employer to provide site levels or benchmarks such as those in question here. Even if that is so – and it must be said that Mr Curmi's affidavit sheds some doubt about the universality of this practice - the significance of the existence of such a practice is unclear. The Tribunal has not been directed to any legal consideration that would prohibit the Parties from contracting otherwise. If, rather, PBL's point is that the practice ought to inform the interpretation of the Contract, it would first have to be shown that the Contract is unclear and, further, that the evidence of the practice – constituting a commercial custom - is not simply that the employer provides the data but also assumes responsibility for it. The Tribunal finds, as we shall see, that the Contract is clear enough. It follows that this point need be investigated no further. That said, the evidence produced regarding the point on custom would, in any event, have been insufficient to sustain PBL's case.

26. The second argument goes to impossibility. Both Professor Torpiano and Mr Curmi (see para. 21 above) stated that it was impossible for PBL to discover the error. Perhaps neither of them meant this literally but if they did, it cannot be accepted. It is plain that there was nothing to stop Mr Curmi from checking Matsurv's transposition: he simply chose not to do so because he did not think it was his responsibility to undertake that particular task. If proof of possibility of checking were required, then it can be found in the fact that when the water ingress became significant, PBL checked the level in question and found it to be wanting.

27. The Tribunal turns now to the Contract. The first relevant provision is the description of the Employer's Requirements under the heading 'Topography':

> All levels shown on the Survey Drawings are referred to Mean Sea Level.
>
> A topographical site survey was carried out by Mat-Surv, details and drawing are being supplied by Employer. A red line drawing of the site is also included highlighting the boundaries of the site, The Contractor shall be responsible to verify the accuracy of the data given in the topographical survey and should inform the Project Manager of any discrepancy before the commencement of any Works.
>
> Should further clarification be required the Contractor shall ask the assistance of the Project Manager.

> The Contractor shall at its own cost erect and maintain such permanent benchmarks and survey stations as the Project Manager may deem necessary.

28. The next relevant provision is that headed 'Setting-Out Dimensions and Levels', also forming part of the Employer's Requirements and found immediately after the provision on 'Topography'. This reads as follows:

> The Contractor shall, before commencing any excavation, satisfy itself that any dimensions, setting out and Site levels, whether spot or contour, shown on the drawings, are correct. The Contractor shall be responsible for the true and proper setting out of the Works and for the accuracy of the positions, levels, grades, dimensions and alignment of all parts of the Works. The contract shall set construction stages, pegs, benchmarks and any additional measures or control points required, by which it shall govern and execute the Works. Setting out information shall be submitted for the approval of the Project Manager.

29. Turning to the Bill of Quantities, we find the following at Point B.11:

> The Employer shall provide site coordinates to the Contractor with two (2) stations which shall be within the vicinity of the site. The eastings, northings and levels of these points shall be provided by the Employer's surveyors and any further topographical surveys, datums or setting shall be the Contractor's responsibility.

30. PBL's construction of these paragraphs is set out at para. 17 above. It is difficult to understand the distinction PBL makes and, more so, the basis for it. It is clear that the benchmarks in question, transposed on to the Site by SCL's surveyors, set the level from which, or on the basis of which, other measurements were to be taken and calculations made. They constituted, in a sense, the base information from which all, or perhaps most, other measurements were to be derived, at least in part. But that does not change the fact that they were levels calculated and set on behalf of SCL from, or referenced to, mean sea level. As we saw, the section on topography required the Contractor to 'verify the accuracy of the data given in the topographical survey'. *That data included, as we have seen, the benchmarks or levels in question and, as is also stated in the survey itself and, indeed, in the opening paragraph in the section on topography, they* ('[a]ll levels') *were* 'referred to Mean Sea Level'. *There is nothing in this section which would except the benchmarks from PBL's obligation to verify. PBL's obligation in this regard is repeated in the section on setting-out, dimensions and levels. Here again, PBL was required to* 'satisfy itelf' *of the correctness of, amongst others,* 'Site levels, whether spot or contour, shown on the drawings'. *There can be no serious argument to the effect that the benchmarks did not set levels on the Site, in this case spot levels. Again, the obligation is as clear as it can be.*

31. Is PBL's clear obligation in terms of the Employer's Requirements in the Contract whittled down or even negated by the Bill of Quantities? As we have seen, Point B.11 of the Bill of Quantities makes it an obligation on the Employer to provide 'site coordinates … with two (2) stations which shall be within the vicinity of the site.' *It further provides that* '[t]he eastings, northings and levels of these points shall be provided by the Employer's surveyors and any further topographical surveys, datums or setting shall be the Contractor's responsibility'. *This appears to mean that SCL had an obligation to provide levels outside the Site, not within it. In fact, however, SCL provided the levels within the Site. However, it remains that, in terms of the Employer's Requirements, it was incumbent on PBL to verify the accuracy of the data provided by SCL, and that data included the benchmarks in question, whether SCL had an obligation to provide them as they did or in some other way. Point B.11 deals only with what information SCL had to provide (and, arguably, it had no obligation to provide the datum points in question on the Site, but only stations in the vicinity of the Site), not with the verification of that information, which is dealt with in the Employer's Requirements section. It follows that the reference to the information that SCL was required to provide, even if it included the benchmarks in question, is not terribly helpful to PBL. PBL was nonetheless obliged to verify it.*

32. By PBL's own admission, it failed to do so. Moreover, it is clear that, had it done so, the error could easily have been discovered, as it was discovered in December of 2019 when there was substantial water ingress. Had it been so discovered, the consequences would, in all probability, been avoided. It follows that PBL's claims for (i) costs incurred in the actual over-excavation and (ii) consequential damages to equipment, must be dismissed.

<u>Vertical over-excavation</u>

33. Excavation in a vertical plane, both straight and sloped, beyond the perimeter of the Site, happened in several areas. All of these are shown graphically on the plan appended to Dr Zaffrani's first affidavit as Annex 5. However, SCL's claim is not in respect of all the excavation beyond the perimeter. Rather, the claim is limited to the following areas:

a. The sloped over-excavation marked as Area 2 between points "O" and "A" on the plan;
b. The sloped over-excavated area marked as Area 3 between points "B" and "D" on the plan; and
c. The vertical over-excavation between points "O" and "A" and between points "B" and "C".

The issue concerning over-excavation in the area between points "A" and "B" was in effect resolved when the owner of the neighbouring tenement (SmartCity (Malta) Limited ("SCM")) accepted to resolve it at no cost to SCL. In so far as concerns the area between points "D" and "D'", SCL had decided to consider the over-excavation as a

consequence of the condition of the Site ('the friable nature of the rock'), not as a mistake by PBL. It would appear that PBL were even paid for the over-excavated quantities.

34. According to PBL, the question for the Tribunal on this issue is whether the evidence supports PBL's stance that the rock in the areas in respect of which a claim is extant was friable to such an extent that PBL could not but over-excavate to the extent that it did. This position implies that the risk of the condition of the Site was on SCL: if it was friable to the extent suggested, then the consequences were to be borne by SCL. On the other hand, SCL maintains that:

a. The risk inherent in the condition of the Site was contractually assumed by PBL; and
b. Subsidiarily and in any event, the rock in the areas in respect of which the claim is extant could and should have been excavated without the necessity of over-excavation beyond the relevant tolerance level.

35. The Tribunal will deal first with the issue of risk as allocated in the Contract. The following are the relevant clauses:

> General Instruction 1.3.23
>
> Tenderers are required to visit the Site and its surroundings in order to assess, at its own risk and expense, the factors and conditions that are likely to affect the progress of the works or otherwise affect the execution of the works in any way. No claims or requests by the successful Tenderer for any additional payment or extension of the completion period on the grounds of ignorance of the site conditions shall be entertained by the Employer.
>
> Particular Condition 11
>
> … The Contractor shall not be paid for any over-excavation and the Employer reserves the right to contra-charge any incurred expenses in respect of any such-over-excavation.
>
> Supplementary Conditions (p. 25 of the Contract)
>
> The Contractor shall:
>
> - Omissis –
>
> (d) take all necessary precautions to prevent damage to neighbouring and adjoining property …
>
> General Condition 9.1
>
> The Employer may at any time prior to the expiry of the period stated in the Appendix, notify the Contractor of any defects or outstanding work. The Contractor shall remedy at no cost to the Employer any

> defects due to the Contractor's design, Materials, Plant or workmanship not being in accordance with the Contract.
>
> The cost of remedying defects attributable to any other cause shall be valued as a Variation. Failure to remedy any defects or complete outstanding work within a reasonable time of the Employer's notice shall entitle the Employer to carry out all necessary work at the Contractor's expense.
>
> Tender Document, Section B.03
>
> No payment shall be for over-excavation. Over-excavation in excess of 100mm tolerance shall be subject to a charge for remedial works up to a maximum value of Euro 300/m^3.

36. PBL dedicated a significant part of its submissions to the issue of vertical over-excavation, but it largely ignored the contractual issue underpinning it. Given that the contractual point constitutes SCL's main argument on vertical over-excavation, it was raised by the Tribunal during closing oral arguments, but the only point addressed by counsel to PBL was how the above clauses, specifically Particular Condition 11, impacted SCL's claim for delay damages. It is, it must be said, a gaping hole in PBL's defence on the issue of liability for making good the vertical over-excavation (the delay issue will be dealt with separately).

37. As we have seen, PBL was required to assess 'the factors and conditions that [were] likely to affect the progress of the works or otherwise affect the execution of the works in any way' and PBL was, inter alia, not to be entitled to any additional payment or time on the grounds of ignorance of the condition of the Site. Moreover, it was made clear that PBL was not only not entitled to payment for any over-excavation but was liable to be contra-charged therefor by SCL. Furthermore, PBL had to ensure it did not damage any neighbouring property; it had to make good any defects due to the factors mentioned in clause 9.1 of the General Conditions; and it was liable to pay for any remedial works for over-excavation 'up to a maximum value of Euro 100/$m^{3'}$.

38. In the Tribunal's view these clauses, taken singly and, more so, together, make it amply clear that PBL accepted the risk that the Site conditions could have been such as to require over-excavation, with the consequence that it was for PBL, at its cost, to reintegrate any such over-excavation (or to pay for it). PBL's position in this regard is further complicated by the fact that there were two geo-technical reports, one prepared in August 2018 and the other in November 2018, both of which gave important information about the condition of the Site. According to Perit Scicluna, the latter report was made available to PBL when the invitation to tender was originally issued. On the other hand, Professor Torpiano notes that the report of August 2018 was attached to the tender documentation. That said, Professor Torpiano notes that both reports formed part of the Contract. PBL does not appear to contest that it had

access to both documents at the time it contracted with SCL, or before. Indeed, and somewhat ironically, PBL quotes both reports fairly extensively, but quite how these are supposed to support PBL's position, rather than serve to make it completely hopeless, is hard to understand.

39. PBL did not only assume the risk, but it did so with relevant information provided by SCL.

40. If the Tribunal is wrong on this, the Tribunal would still have found against PBL on this issue on the basis of the relative strength of the Parties' evidence. Key, in the Tribunal's view, is the report compiled by Perit Scicluna on 19 May 2020 and the addendum to it bearing the same date. Although Perit Scicluna was a member of the architectural firm appointed by SCL and, thus, cannot be said to be totally impartial, he is a professional and his report comes across as such. Briefly, he made the following points (i) PBL was required to be, and in fact was, aware of the Site conditions (including subsoil conditions, except as stated); (ii) PBL's attention was drawn to the over-excavation issue from as early as 6 June 2019 and was requested to increase the surveyor's presence, the issue being repeatedly brought up throughout the duration of the Works; (iii) PBL had assumed the risk in terms of the Contract; (v) PBL was not being held responsible for certain areas because PBL was not aware and could not be aware of the circumstances of the composition of the subsoil strata; and (vi) '[i]n other areas, the ground rock, although fractured and fissured to various degrees and to different deterioration amounts, excavation could have been carried out to a high degree of precision. It is not composed of loose boulders in a way where it had to be scaled beyond the property line.'

41. Even though PBL continued to maintain that it was not responsible for the over-excavation claimed by SCL, this report does not appear to have been rebutted with technical arguments soon after, or even much later than, it was issued. It was only challenged technically during these proceedings, in the form of a report by Professor Alex Torpiano.

42. The main issue with Professor Torpiano's report is that his brief was rather too narrow for it to outweigh Perit Scicluna's reports. Professor Torpiano was only given a limited set of documents to review and, as the Tribunal understands, he did not visit the Site. Moreover, and rather importantly, it does not appear that he was properly instructed as to the specific areas which are the subject of the dispute, as opposed to other areas where there was over-excavation, but where there is no claim. Thus, the areas which appear to be the subject of paras. 4.6, 4.7 and 4.8 of his affidavit seem to be areas in respect of which SCL has not made a claim precisely because of the issues Professor Torpiano addresses. Furthermore, when referencing the minutes of the meeting held on 27 August 2020, it does not appear that Professor Torpiano was instructed as to which part of the Site – some 25% of it – did not require any intervention.

43. Professor Torpiano's concludes that:

> 'a clean vertical cut along the site delineation, as seems to be expected by SRL, was simply not possible. This is not the result of the wrong excavation equipment being used, nor of worker lack of attention, but of the nature of the rock in the area.'

44. SCL do not dispute this, but only for those parts of the Site which are not the subject of their claim. As regards those parts which are the subject of the claim, they have produced targeted evidence, summarized above, to the effect that the over-excavation in question was not justified. This evidence is from a relatively impartial witness, the architect in charge of the works, who was clearly well versed with the Contract, with the Site and with the Works.

45. PBL attempted to counter this by presenting an ex parte report by a renowned and highly competent perit who is also a professor, with a specialisation in Structural Design, Theory of Structures and Rock Engineering. Clearly, he is more than competent to opine on this matter, and he demonstrated appropriate impartiality both in his report and in his cross-examination. That said, the Tribunal finds that Professor Torpiano's report fails to deal directly with SCL's targeted claim in respect of over-excavation in specific parts of the Site and thus as unhelpful in this regard. This is no fault of Professor Torpiano's: it is simply the result of the limited and somewhat generic, or not sufficiently focused, information which he was given. Assuming that PBL were able to overcome the risk factor assumed in terms of the contract, it was for PBL to demonstrate with clear evidence (as the party with the burden on this point) that, in those parts of the Site which are the subject of SCL's claim, it could not but excavate as it in fact did. The Tribunal finds that PBL has fallen well short of proving this.

46. As a result, SCL's counter-claim in this regard must be upheld in principle. Quantum was not seriously challenged by PBL, but the Tribunal notes that SCL's evidence does not fully support its calculation. In QP Management's letter dated 3 April 2020, the cost calculation for the relative rectification works was this:

	m3	Estimated Rectification Cost	Cost
Over excavation - Horizontal	~~2,023.00~~	~~@ 28/m3~~	~~-€ 56,644.00~~
Over excavation - Vertical	462.79	@ 300/m3	-€ 138,837.00
Pending Agreement w Smart City	715.21	@ 300/m3	-€ 214,563.00
Sloped Area 2	128.00	@ 150/m3	-€ 19,200.00
Sloped Area 3	596.00	@ 150/m3	-€ 89,400.00
Sloped Area 4	~~577.00~~	~~@ 150/m3~~	~~-€ 86,550.00~~

47. It will be noted that the rectification cost for Sloped Area 2 and Sloped Area 3 is calculated at €150/m³ and not the maximum of €300/m³ as in SCL's claim. (The letter contains an explanation for this: these areas do not require potential shotcreting or backfilling). Accordingly, the Tribunal can only accept this counter-claim as justified in the amount of €247,437.

The claim for delay penalties

48. SCL has advanced a claim for €1,715,000 representing the delay damages allegedly due by PBL to SCL, calculated at the stipulated rate of €5,000 per day for a total of 343 days of delay. PBL maintains that (i) no delay penalties are due, as the Works (as defined in the Contract) were completed within the time frame stipulated in the Contract; or (ii) if penalties are due, then they should be significantly abated or mitigated for the reasons explained in PBL's note of submissions (as supplemented). SCL counters, on this latter point, that no abatement or mitigation is possible because, in its view, the penalty was stipulated for mere delay (even though the Contract does not say so in terms) and art. 1122(1)(b) makes it unlawful for the Tribunal to abate or mitigate such a penalty.

49. The Tribunal will consider the legal point first.

50. Art. 1120(1) provides that a penalty represents the compensation for the damage which the creditor sustains by the non-performance of the principal obligation. Art. 1120(2) then provides that the creditor may sue either for specific performance or for the penalty and art. 1120(3) clarifies that this means that the creditor cannot demand both specific performance and the penalty. However, it also makes an exception: the penalty may also be demanded when it has been stipulated in consideration of mere delay.

51. In other words, the creditor must in all cases – except where a penalty is stipulated for mere delay – make a choice: either he demands specific performance or, in lieu of that performance, he can demand the penalty. The underlying logic is that the penalty is, as made clear in art. 1120(1), the compensation for the damage sustained because of non-performance. If that performance is enforced, it follows that the penalty can no longer be claimed: otherwise, there would be a double recovery. However, as stated, this does not apply when the penalty does not compensate the creditor for non-performance but only (or merely, as the law puts it) for the delay in the performance. In this latter case, the creditor can demand both. There is no double recovery in this case as the penalty does not compensate for non-performance but for late performance, which gives rise to a different kind of loss.

52. Art 1122 then provides as follows:

> 1. It shall not be lawful for the court to abate or mitigate the penalty except in the following cases:

1. If the debtor has performed the obligation in part, and the creditor has expressly accepted the part so performed;

2. if the debtor has performed the obligation in part, and the part so performed, having regard to the particular circumstances of the creditor, is manifestly useful to the latter. In any such case, however, an abatement cannot be made if the debtor, in undertaking to pay the penalty, has expressly waive his right to any abatement or if the penalty has been stipulated in consideration of mere delay.

2. Where an abatement is to be made under this article, the penalty shall be reduced in proportion to the unperformed part of the obligation.

53. If one considers art. 1120 and 1122 together, we can see that the law also deals with a situation which is very common, and which is what is alleged by SCL in this case: partial performance. What are the creditor's options in such a scenario? The first option is to accept the partial performance and to demand specific performance of the unperformed part. This would exclude a penalty, except if agreed for mere delay. The creditor's alternative is to reject the partial performance and to claim the penalty in full.

54. But as we have seen the court may abate the penalty:

a. If partial performance is expressly accepted; or
b. If the part performed, having regard to the circumstances of the creditor, is manifestly useful to him, except if the right the abatement was waived or if the penalty only covers the delay.

55. What does para. (b) mean when it refers to partial performance which is manifestly useful to the creditor? It is the Tribunal's view that, although the law does not say as much expressly, the clear implication is that the law is referring to those cases in which the creditor opts not to accept partial performance, and claims the penalty instead, even though such performance is manifestly useful to him. This, it appears to the Tribunal, is clear from para. (b) itself and confirmed by the context, which is mainly provided by para. (a), in which the law deals with the situation of partial acceptance. It seems that the law considers the creditor's choice not to accept what is manifestly useful to him as somewhat capricious, or at least unduly harmful to the debtor. In such a case, the law provides, as we have seen, that the court may (except in certain specific circumstances) reduce the penalty, thus ensuring that the debtor is not unduly penalised.

56. In this case, SCL expressly accepted PBL's performance, which it considers to be partial. In the Tribunal's view, this means that the relevant paragraph is para. (a) of art. 1122(1): para. (b) – relied on by SCL – finds no application. It follows that the Tribunal may abate or mitigate the penalty even if the penalty was stipulated for mere delay, because there is no exception to this effect in para. (a). Therefore, the Tribunal need not

consider whether the stipulation was of this kind, as the issue is inconsequential. In light of the foregoing, the Tribunal need not consider the cases referred to it by PBL on the interaction between art. 993 and art. 1122: the issue of good faith need not be resorted to render the penalty subject to a possible abatement or mitigation in this case. But as we shall see, the issue of good faith remains relevant.

57. Having found, as a matter of law, that an abatement or mitigation is possible, the Tribunal must now move on to consider whether (i) there was a delay and, if so, what its extent was; (ii) it should abate or mitigate the penalty in this case; and (iii) if so, by what criterion and, on the facts, by how much.

58. The central facts are as follows:

a. The commencement date for the performance of the Works was 29 April 2019. The original completion date was 3 November 2019. PBL requested extensions of time during the performance of the Works. SCL's representative, QP Management (often referred to as the Engineer) awarded an extension of 10 days for the reasons explained in Dr Zaffrani's first affidavit (at p. 12), which meant that the new completion date was 3 November 2019.
b. If one excludes the remedial works that, according to SCL, PBL had to perform, the Works were completed on 8 January 2020 (which the Tribunal will, for convenience refer to as "the date of practical completion"*).*
c. On 21 July 2020, QP Management released an instruction to PBL by means of which PBL was instructed to import some 3,000m^3 – 4,000m^3 of crushed backfill material for the purpose of reintegrating the horizontal over-excavation and in order to provide a stable, level and dry surface in order to allow a third-party contractor to carry out geophysical investigations on the Site.
d. The backfilling operation took place between 24 July 2020 and 30 July 2020 (or thereabouts).
e. On 15 September 2020, QP Management wrote to PBL requesting the removal of what was considered by SCL to be excess backfill material imported into the Site.
f. By letter dated 8 October 2020, SCL called upon PBL to confirm that PBL would carry out the remedial works SCL considered were PBL's responsibility and advised that in the event of non-compliance, SCL would have to engage a third-party contractor to perform the remedial works at PBL's cost and risk.
g. On 19 October 2020, QP Management issued a formal instruction to PBL to remove what it considered to be excess backfill material.
h. On 29 October 2020, SCL issued a Taking-Over Notice. In terms of this notice, SCL advised PBL that the Works, although not fully complete, were ready for taking over as at the date of the notice. PBL was further called upon to promptly complete the outstanding work consisting in the remedying of the over-excavation and the removal of the extra backfill material, within 5 days.
i. On 17 February 2021, SCL issued a Notice of Default in terms of which it formally notified PBL that it had failed the execute the Works in accordance with the Contract. The defaults were noted as: (i) over-excavation; (ii) failure to remove the over-

imported backfill material; and (iii) delays. A fourteen-day cure period was afforded and PBL was advised that, if it failed to cure, then SCL would be terminating the Contract and making resulting claims.

j. The Contract was terminated on 24 March 2021 and PBL was requested to pay the amount which is the subject of the counter-claim.

k. The final payment certificate was issued by QP Management on 1 April 2021.

59. SCL are claiming a delay of 343 days, calculated from 13 November 2019 up until the date of taking over of the Site, 29 October 2020, less a week (covering the backfill exercise). SCL added that it could have argued that penalties should be calculated up until the termination of the Contract, but that it would have been morally wrong to adopt that position.

60. SCL's claim can, for convenience, be split into two parts: the first covering the period from 13 November 2019 up until the date of practical completion ("Part 1 of the Delay Claim")*, and then the period from 9 January 2020 up until the date of taking over, that is 29 October 2020* ("Part 2 of the Delay Claim").

61. Based on the time limit set out in the Contract and the extension granted by QP Management, the Works had to be completed by 13 November 2019. That they were not so completed until the date of practical completion is uncontested. It is therefore for PBL to demonstrate that the extension granted by QP Management was insufficient and, if so, by how much it should have been extended.

62. In its note of submissions, PBL makes several points to justify the delay in Part 1 of the Delay Claim. These can be summarised as follows:

a. Delay in the provision of working excavation drawings which, it says, were only provided after the commencement date;

b. The official stoppage of works in June 2019;

c. Stoppages due to a wedding, and a minister's visit;

d. The remedial works covered by Instruction No. 8 (13 November 2019); and

e. The datum point issue and the resulting sea-water ingress.

63. The Tribunal will take these justifications in turn. The first in the list only appears to have been raised during these proceedings. Much was made of it in PBL's note of submissions. But, in an email from Perit Cachia dated 2 October 2019, the claim for additional time was limited to items b), c) and d) (item e) was, of course, still in the future). Had the issue actually caused a delay, it is highly probable that PBL would have raised it at that time. To raise it now seems contrived. Given this, the Tribunal does not consider item a) to be justified.

64. Turning to justification b), QP Management allowed two days for this because PBL obtained a derogation. PBL had originally claimed two weeks. Exactly how long PBL were inactive because of this measure is unclear. It appears from a letter from QP Management to PBL dated 14 June 2019 that PBL continued works even though the government directive appears to have been dated 13 June 2019 and that a client

instruction predated that (10 June 2019). A further instruction was issued on or around 25 June 2019. It also appears that PBL obtained an exemption of sorts, but when it did so is unclear. It further appears that the interruption was not prolonged. In his second affidavit, Perit Cachia says that '…Naf li fil-fatt ix-xogħlijiet ġew sospiżi għal xi ġranet…' *This does give the Tribunal the impression that the interruption was as long as two weeks. That said, QP Management's two days appears unduly short. On the limited evidence available, the Tribunal assesses,* arbitrio et boni viri, *the delay caused by this issue at one week, or 7 days.*

65. In so far as concerns justification c), QP Management allowed 2.5 days. PBL had claimed 2 days. PBL's complaint in this regard is therefore manifestly unjustified.

66. There is a reference to justification d) at para. 138 of PBL's note of submissions. Although the Tribunal can understand that this issue might have caused delay, whether it did so in fact and, if so, what the delay attributable to it was, is entirely unclear. PBL does not appear to have kept records detailing several of the causes of delay which it now invokes. This justification fails for lack of evidence.

67. The delay due to the datum point issue is a little trickier. The Tribunal has found that although the factual error was, in the first instance, attributable to SCL, legal responsibility lay with PBL, which was obliged the verify the data provided by SCL. This will result in the Tribunal rejecting PBL's claim for the extra works and for damages to equipment. That said, not to award an extension of time and, hence, to apply a penalty for what was, at least factually, a shortcoming on SCL's part would, in the Tribunal's view, have been to visit PBL with more than its fair share of the cost of this unfortunate event: it is one thing to deny PBL its actual costs; it is quite another to saddle PBL with damages for delay. Indeed, QP Management appear to have accepted this position in that they awarded PBL 5.5 days because of this event. Was this enough?

68. According to Dr Zaffrani, PBL had excavated some 75% of the Site by 6 November 2019 when, according to him, they should have been at 100%. Given that QP Management granted an extension until 13 November 2019, this cannot be quite accurate, but even if one allows for this, it is indicative that PBL was somewhat in delay. Indeed, PBL in effect accepts this, arguing that '… **there was never an issue of delays between the parties, no sense of urgency** …' *and* '… this [Dr Zaffrani's assertion that PBL was in delay since the beginning] … is factually true …' *However, it was around this time that the water ingress issue was making itself felt. In fact, Perit Cachia flagged flooding on 8 November 2019. How much this impacted progress on the Site is not entirely clear, not least, it must be said, because PBL has not adduced a detailed, documented timeline. Dr Zaffrani says that excavation under water took place for a limited time, hence why he only afforded 5.5 days of additional time for to cover this issue. How he got to this number is not clear either.*

69. What is clear is that it took at least until 11 December for the cause of the problem to be identified. In light of this, it appears to the Tribunal that QP Management were rather stingy in their assessment of the delay this issue caused. It is a pity, as noted, that

PBL made no reasoned, documented assessment of the actual delay this caused: their case, as the Tribunal understands it, is that this, together with the other elements described above, justified the full period covered by Part 1 of the Delay Claim. This has not fully been sustained by the evidence submitted by PBL which, as we have seen, implicitly accepts that there was at least some delay (the issue of whether SCL's claim in this regard was waived, or lacking in good faith, is dealt with separately): but there is sufficient evidence to conclude that QP Management's assessment of the delay caused by the datum point issue is likely to have amounted to more than 5.5 days. In the circumstances, the Tribunal can only assess the resulting delay by applying discretion, and it does so by assessing it at three weeks, or 21 days.

70. To conclude on the factual element in respect of Part 1 of the Delay Claim, the Tribunal finds that PBL should have been granted 20.5 days in addition to the 10 afforded by QP Management.

71. Turning to Part 2 of the Delay Claim, the issue here is not whether PBL should have been afforded further extensions, but whether SCL waived its claim or else whether it cannot claim it because it breached its obligation to exercise its contractual rights in good faith.

72. PBL asserts that SCL's claim for delay damages first surfaced when the relationship between the Parties went south, much later than the date of practical completion. PBL's adds that time or, rather, delay was never really an issue between the Parties until the claim was made, and that SCL never appeared to be in much of a hurry. In PBL's view, the claim for delay damages was an arm-twisting tactic deployed by SCL to force a settlement of the Parties' respective claims and was, hence, in bad faith. SCL acknowledges that our courts have, in recent years, admitted a good faith exception even to the rule in art. 1122(1)(b), but it argues that the record shows that SCL acted in utmost good faith and that, arguably, it was PBL that acted in bad faith.

73. Although timing, in the sense of delay and, more particularly, its consequence in terms of penalties for delay, was brought up every so often by QP Management before the date of practical completion and even after that, it does not appear to have been high on SCL's agenda; perhaps not even on its agenda at all, except maybe as a fall-back position. As far as the Tribunal could make out, it was only raised by QP Management, and not by SCL, until notice of default was given on 17 February 2021. It is true, of course, that QP Management was, contractually, the client's representative and, therefore, anything said by QP Management was said by SCL. But the record appears to indicate that the Parties and QP Management saw QP Management's role mainly as that of engineer, in other words as an independent technical expert, and much less, if at all, as SCL's representative. As such, it would have been QP Management's role to flag timing issues, and then it would have been up to SCL to claim delay penalties or otherwise. In assessing the Parties' and QP Management's conduct, this reality on the ground cannot be ignored.

74. SCL maintains that

> '… whether directly or through QP, [it] acted in utmost good faith and strictly in compliance with the procedures established in the Contract, [and] constantly and in a timely manner informed PBL on any matters related to the progression of the works, including the delays and the defects in the execution of the works which required rectification'.

75. From a factual perspective (leaving aside, for the moment, the qualifier of utmost good faith), this is broadly true in terms of SCL's claims of defective works. It is also largely true for QP Management in respect of delays the period up until the date of practical completion. It must also be said that QP Management flagged delays, though strangely with far less insistence, even after that. But it is far from clear that it was raising the delay issues on behalf of SCL. It may well have been doing so as de facto *engineer. In fact Dr Zaffrani testified that*

> 'Ryan Otto (SCL CEO) was always trying to find amicable settlements in relation to the relationships with PBL and till October 2020 never claimed for penalties, since its main interests was that excavation words were completed and the over-excavations rectified, to allow the Construction to start without any risks.'

Ryan Otto does not directly confirm or deny this in his own affidavit, but he refers to Dr Zaffrani's rendition of events in his own affidavit and, by clear implication, makes it his own.

76. Furthermore, the facts on the ground indicate that, certainly after the date of practical completion, SCL was not in a hurry to take over the Site. It was only some two weeks later, that is on 23 January 2020, that QP Management asked for the completion of edge protection in preparation for the taking over of the Site. This was followed up a few days later, again on or around 20 February 2020 and then some two months later by QP Management. It is not clear when this preparatory work was done if it was ever done. Meanwhile, the Parties continued a somewhat sleepy discussion regarding the over-excavations and final accounting. This process received a bit of a jolt when, in the middle of April 2020, SCM sent a letter to SCL holding it responsible for the vertical over-excavation and, in turn, SCL wrote to PBL.

77. A settlement proposal was made by QP Management on 14 May 2020. No mention was made in that proposal of any delay penalties. It appears that a further settlement attempt was made on 10 July 2020. Again, delay penalties made no appearance. Around this time, some kind of partial settlement was reached (if not properly documented) regarding PBL's claim for extra works in connection with the horizontal over-excavation. PBL was to be paid 50% of the volume over-excavated (and this was duly accounted for) and was to backfill the Site, free of charge. This work was completed by the end of July based on an instruction issued by QP Management (Instruction No. 10) and, it would appear, verbal instructions regarding the level the backfill was to reach (more on this aspect below). Meanwhile discussions and

exchanges continued, in a relatively friendly tone, on the question of the vertical over-excavation until, on 15 September 2020, QP Management advised PBL that the level of the backfilling went beyond that instructed. At this point, things started to become formal, with a legal letter issued on 8 October 2020 and formal taking over on 29 October 2020. PBL was also advised, by letter from Ryan Otto on 19 November 2020, of SCL's claim in respect of the cost of the removal of the excess backfilling, in the amount of €270,000 circa. Still, there was no mention of a claim for delay penalties.

78. Hope of a settlement was not lost and, on 18 January 2020, QP Management presented yet another settlement proposal to the Parties. This document contains what appears to be the first reference to a claim for delay damages. At page 4 of the relevant document, we find the following:

DEDUCTIBLES DUE TO RECTIFICATION WORKS & DELAYS TO BE RETAINED BY THE EMPLOYER:

• Rectification works along the NURR	€ 356,037.00 (worst case scenario for Polidano)[1]
• Removal of additional material	€ 237,312.00 [2]
• **TOTAL partial**	**€ 593,349.00**
• Delay Damages (never claimed by SRS)	€ 295,000.00 [3]
• **TOTAL incl. delay damages**	**€ 888,349.00**

Notes:

1) To date AP design of the Over-Excavation remedial works is under revision due to a coordination with Shoreline requirements, including but not limiting to access of heavy vehicles in certain part of the shoreline Property. In this circumstances we are considering the worst case scenario applying 300 €/m3 of over excavated material (in the areas mentioned in QP Letter SRS-PM-000-LT-00-0124 as "Over excavation– Vertical", "Sloped Area 2" & "Sloped Area 3") as specified in the Contract. This amount in case of litigation will be substituted with the real costs that Shoreline will incur for the over-excavation remedial works.

2) We have considered Matsurv survey of 24/08/2020 showing an finished level of + 700mm above m.s.l. against the prescribed +200 mm. the total extra imported materials are 6,592.0 m3 we considered at the lowest rate received from the market (36.00 €/m3).

3) Commencement Date was 29/04/2019, Completion Date was 03/11/2019, moreover QP recognises that max 1 week could have been lost during the introduction of LN 136/2019 (although Polidano got an exemption) and some other issues. Therefore QP calculated the Completion Date to be 10/11/2019. QP could reasonably consider that the Contractor finished the bulk part of its Works (carting away excluded) on 08/01/2020. The delays calculated in this way are therefore 59 days at a penalty of 5,000.00 €/day)

79. It will be noted that QP Management point out that the delay damages were 'never claimed by [SCL]' *and that the delay was of 59 days calculated up until the date of practical completion and not, as is now claimed, up until the formal taking over of the Site. QP Management's proposal was rejected by PBL by letter dated 28 January 2021.*

80. QP Management then issued a report (presumably to SCL) dated 5 February 2021. The possibility of claiming delay damages for the period from the day after the date of practical completion until formal taking over was, it appears, first mooted in this document. There is, again, a reference to the fact that SCL had never claimed for Part 1 of the Delay Claim; and two questions to SCL's lawyers: the first whether Part 2 of the Delay Claim was feasible and the second whether the delay claim ought to be limited to 10% even though there was no such limitation in the Contract.

81. SCL issued a notice of default on 17 February 2021. The notice includes a reference to delays. This appears to be the first time SCL itself made reference to delays. Still, there was no quantification, nor a reference to the period in respect of which a default was being flagged.

82. PBL was given a fourteen-day cure period. It is uncontested that PBL did not cure the asserted defaults: that this was because PBL denied their very existence.

83. The notice of default was followed by a notice of termination dated 24 March 2021. This, it appears, was the first time PBL was given notice of the delay claim by SCL itself and it was in the amount of €1,715,000, representing a delay of 343 days.

84. Meanwhile interim payment certificates were issued, with no mention whatsoever of delay penalties.

85. Can it be said, as suggested by PBL during oral submissions and in its supplementary written submissions, that SCL had waived its delay penalties claim in its entirety or, in the alternative, had waived Part 2 of the Delay Claim? The Tribunal thinks not. Whilst it is true that SCL was, itself, silent on the issue of delay until early in 2021, QP Management had, on several occasions flagged the issue, both in relation to Part 1 of the Delay and, even if less vocally, in relation to Part 2 of the Delay Claim, on several occasions. One might add to this that PBL and QP Management were engaged on several occasions on the issue of extensions of time, which is of course important only in relation to delay penalties; but this engagement was, in truth, restricted the period up until the date of practical completion. PBL must therefore have been alert to the fact that a delay penalties claim was potentially in the offing at least in respect of any delay until the date of practical completion.

86. Moreover, there is nothing to indicate, let alone indicate unequivocally (which is the evidence that would be needed if SCL is to be found to have waived its rights) that SCL had make it clear to PBL that penalties would not be claimed in respect, at least, of Part 1 of the Delay Claim. It is true, as we have seen, that Part 1 of the Delay Claim first made an appearance in QP Management's settlement proposal of 18 January 2020 (see para. 78), and that when it did so, it was indicated as never having been claimed by SCL. But evidence that SCL had not (yet) made a claim is not quite evidence of waiver; it is no more than evidence of failure, until then, to make a claim: a fact which, in and of itself, is inconsequential. It must also be recalled that QP Management had, as we have seen, flagged the delay issue in respect of the period up until the date of practical completion several times, and there was clear engagement on this matter.

87. Can the document of 18 January 2021 be construed as evidence of a waiver of Part 2 of the Delay Claim? Again, the Tribunal thinks not. The document created by QP Management document contained a settlement proposal made by QP Management itself, presumably with at least a modicum of independence, rather than as SCL's representative. That the settlement proposal of 18 January 2021 cannot be said to embody SCL's position is evidenced by the fact that, on 5 February 2021, QP

Management prepared a report - one assumes to SCL - setting out the position as QP Management understood it and raising questions for SCL's lawyers on (inter alia) *the viability on Part 2 of the Delay Claim. It is clear enough, in the Tribunal's view, that the settlement proposal of 18 January 2020 and the report of 5 February 2021 represent QP Management's independent assessment of the position and their view on a fair settlement.*

88. It follows that the 18 January 2021 document cannot be said to be representative of SCL's position. This means that there is no evidence of SCL having waived Part 2 of the Delay Claim either. Of course, it may well not have considered the possibility of claiming delay penalties for this period until QP Management raised the matter in the 5 February 2021 report, but not having considered a claim is much the same as not advancing one and, as we have seen, that is very different from waiving it.

89. PBL's assertion that SCL waived its claim to delay penalties or, in the alternative, to Part 2 of the Delay Claim must therefore fail.

90. This brings us to consider whether, in advancing the delay penalties claim or, in the alternative, in advancing Part 2 of the Delay Claim, SCL was, as PBL asserts, lacking in good faith.

91. Good faith is not easy to define. In light of this, one might be tempted to follow Justice Potter Stewart's famous opinion in the obscenity case of Jacobellis v. Ohio in which he said:

> "I shall not today attempt further to define the kinds of material I understand to be embraced within [the term 'hard-core pornography']; and perhaps I could never succeed in intelligibly doing so. *But I know I when I see it* …" (emphasis added)

92. One might also approach the issue in the light of the less famous, but perhaps more elegant, Latin maxim in omnibus quidem, maxime tamen in jure, aquitas spectanda sit*, sometimes cited by our courts.*

93. But these approaches are, in the Tribunal's view, unsatisfactory. It cannot be enough to say that one recognises good faith (or the lack thereof) when one sees it, or that equity must be applied, without any guiding principle. This would mean that the body entrusted with a decision will have a virtual carte blanche *to decide as it wills. It was wisely said that:*

> "The court … [may have] a wide discretion, but it does not sit under a palm tree."

94. The Tribunal will not attempt a definition, but it will attempt to describe some of its features and then to consider SCL's actual conduct in the light thereof. In the Tribunal's view the concept, as applied to written contracts, will often be concerned with (i) matters not been expressed in the writing; or (ii) matters dealt with, in practice, in a manner inconsistent with, or not entirely consistently with, the writing.

In both instances, one must have regard to the conduct reasonably expected of a party in the circumstances.

95. In this case, we are dealing with a matter dealt with in the writing, namely delay penalties. The question is whether the Parties dealt with it in accordance with the Contract and in the manner in which one would expect a creditor to act its regard and, if not, what the consequences of that failure are.

96. As we have seen, PBL's argument that SCL waived its claim for delay penalties, either in whole or in part, fails. However, SCL may still have acted in a way as to have misled PBL into believing that a claim (full or partial) would not be made. If so, this may have given rise to a reasonable expectation on PBL's part that a claim would not be advanced, despite the strict contractual position.

97. It appears to the Tribunal that SCL did act in such a manner in respect of Part 2 of the Delay Claim. There are various elements that sustain this perspective:

a. Around the time the Works were substantively completed (on 8 January 2020), it was clear that SCL had, for some time, been maintaining that various works issues had to be remedied, in particular the issue of vertical over-excavation. The issue of delays had also been flagged on several occasions by QP Management and there was engagement on it between PBL and QP Management. But SCL itself never mentioned delay penalties until early in 2021 and during 2020 there were only a couple of oblique references to the issue (of post date of practical completion delays) in QP Management emails;

b. SCL was in no hurry to take over the Site. Although QP Management asked, some two weeks after the date of practical completion, for preparatory work to be performed by PBL for the Site to be taken over, and although this request was followed up two or three times over the next few months, the issue then went rather silent, indicating that the matter was not urgent either at the time of practical completion or even much later. In fact, PBL was not given notice that its failure to perform the work requested in preparation for taking over was delaying the matter and hence causing SCL damages. Neither did SCL act to minimize any such damages by taking the Site over immediately and causing the protective works to be performed by another contractor, as it was entitled to do. From the evidence it is not quite clear whether PBL performed the works in question prior to the actual take over on 29 October 2020, although context would suggest that it did not. If this is so, with the implication that SCL performed the works (or did not need them performed), it (along with other matters) begs the question as to why Site take over was delay by some 9 months.

c. The Parties' focus after effective completion centred around the issues of vertical and horizontal over-excavation: on how to solve the issues technically, and on responsibility. Later, in September 2020, the issues were expanded to include the issue concerning the excessive backfilling. Throughout all of this, SCL did not seem to be in any hurry.

d. Certificates of payment were issued with reservations for the damages resulting from over-excavation and, later, excessive backfilling, but delay penalties never figured at all, not even in the final certificate.
e. The first time delay penalties made an appearance in the discussions between the Parties was in January 2021 and, at that time, that discussion was limited to penalties for the period up to the date of practical completion.
f. Part 2 of the Delay Claim was not specifically mentioned in SCL's notice of default of 17 February 2021 (as delays were not quantified). This may have been taken by PBL as a reference to Part 1 of the Delay Claim, as Part 2 of the Delay Claim did not even figure in the settlement discussions which had taken place before the notice was sent.
g. The main contractor engaged by SCL only took possession of the site in February 2021 even though SCL had formally taken possession of the site at the end of October 2020 and could have done so many months earlier. One might add to this that the contractor needed another 3 months or so to start works.

98. Taken cumulatively, the above elements are likely to have led PBL to understand that Part 2 of the Delay Claim was not being contemplated, let alone potentially claimed. This understanding was not unreasonable: indeed, it was a perfectly reasonable conclusion, drawn from SCL's consistent conduct and from QP Management's conduct which largely mirrored it, at least until early in 2021. Being reasonable, it has a claim to legitimacy, and its consequence is that SCL is now, in the Tribunal's view, debarred from exercising its right to claim delay penalties for the period in question.

99. Turning to the period between 13 November 2019 and the date of practical completion, it will be recalled that the Tribunal found that PBL should have been granted an additional extension of 20.5 days. This brings the delay for the period down from 56 days to 35.5 days. However, as we have also seen, the Tribunal takes the view that art. 1122(1)(a) of the Civil Code affords it the discretion to abate or mitigate the penalty; and that in terms of art. 1122(2), where an abatement is made, then the penalty is to be reduced in proportion to the unperformed part of the obligation.

100. It is not clear whether the law draws a distinction between abatement and mitigation. If it does draw a distinction, then it is arguable that art. 1122(2) only applies to the former, in which case how mitigation is to be applied is unregulated.

101. In the Tribunal's view, where the law uses different terms, a different meaning ought to be inferred. Finding those different meanings in this case is no easy task. Abatement is defined as a reduction in the amount or degree of something. Mitigation, as a legal term, is defined as something which causes one to judge a crime to be less serious, or to make a punishment less severe. Clearly, this cannot be what is meant by the term mitigation in this context, although one may seek to adapt it to a civil context. Interestingly, the words in Maltese are 'tnaqqas' and 'ittaffi'. The sense one gets is that abatement and 'tnaqqis' refer to some kind of technical reduction

resulting from the intrinsic nature of the underlying issue, which demands a reduction which can be calculated against objective facts or criteria. This reading is supported by the use of only these terms in art. 1122(2)). On the other hand, mitigation and 'ittaffi' means some kind of consideration of the fairness, or unfairness, of the outcome of the issue, and the application of discretion, and not a technical calculation, accordingly.

102. If this reading of the law is correct, the Tribunal takes the view that there is no call for abatement of Part 2 of the Delay Claim, as re-dimensioned above. However, the factors that made it illegitimate for SCL to exercise its right to claim Part 2 of the Delay Claim apply also to Part 1 of the Delay Claim, given that it came earlier in time. However, in this case, it is not that SCL is debarred from making the claim but, rather, that the Tribunal may mitigate it based on those factors.

103. Should the Tribunal do so and, if so, how should it go about it? The law does not provide much guidance in this regard. The Tribunal infers that if it is to mitigate and by how much it is to do so is left to its discretion. But discretion must, as far as possible, be principled in its application. Defining the principles is not an easy task, but perhaps in this case definition is not necessary. As we have seen SCL was not concerned about delay at least early in 2021, and possibly not even then. Indeed, it may well be, as PBL has suggested, that SCL used the delay issue in the failed settlement attempts with PBL. This is not a suggestion that such use is necessarily illegitimate. It is simply a conjecture. What is important is the fact of SCL's laidback attitude towards time throughout 2020. Given this, it seems to the Tribunal that, however one defines the relevant principle, this justifies a very significant mitigation, as no damage appears to have been caused by the delay. In the circumstances the Tribunal mitigates the penalty to €5,000 representing a symbolic delay of 1 day.

<u>SCL's claim in respect of PBL's failure to remove the additional backfilling material</u>

104. One of the consequences of the horizontal over-excavation of the Site was that there was a need for backfilling. An agreement was reached in this regard between Mr Polidano of PBL and Mr Muscat, Chairman of SCL, for PBL to supply the material and perform the necessary work, free of charge to SCL. This agreement appears to have been reached sometime in July of 2020, or a little earlier. It was concluded in the context of a broader discussion around the issues separating the Parties, even though a comprehensive agreement was not reached.

105. Based on this agreement, QP Management issued Instruction No. 10 rev 1 on 21 July 2020 instructing PBL to 'backfill the horizontal over excavated areas'*, asking PBL to import and compact around 3,000 – 4,000 m^3 of crushed materials. As explained by Dr Zaffrani, the original instruction only covered the over-excavated parts of the Site, meaning that the backfill had to reach mean sea level. However, it appears that following the issuance of this instruction, PBL was given a further instruction – a verbal one - to backfill the entire site up to +200 mm (i.e. 200 mm above mean sea level).*

106. It is undisputed that the backfilling reached a significantly higher level (+580mm above mean sea level in some areas and higher in others). PBL was informed of this by a letter from QP Management dated 15 September 2020. In its immediate reply, dated 17 September 2020, PBL did not deny the verbal instruction. Instead, it explained that, in its view, the backfilling had to be up to the level it reached to allow SCL to perform the works it intended to perform on the Site. QP Management replied on 23 September 2020 to the effect that (i) if PBL was correct, then SCL should have been informed, and instructions awaited; and (ii) the suggestion made by PBL was, in any event, incorrect.

107. PBL was then instructed to remove the excess backfilling by means of Instruction No 11 dated 19 October 2020. As PBL did not remove the material as requested, SCL sought and obtained quotes for its removal by a third-party contractor. The lower of these quotes was notified to PBL by letter from SCL dated 19 November 2020. However, neither quote was accepted by SCL, and those who quoted were not engaged by it to remove the excess material.

Meanwhile, SCL engaged the contractor entrusted with the construction on the Site, and it is observed in SCL's note of submissions that

> "… in this regard the price for the removal of said material was factored into the total tender offer made by such third party contractor. Consequently, SCL is not in a position to define the cost it incurred for the removal of the over-imported material since it was not billed separately, and in this regard, for the purposes of quantifying the compensation due to SCL for the removal of the over-imported materials, the lower rate of thirty-six Euro per cubic metre (€36/m^3) was used, which resulted in a total of two hundred thirty-seven thousand three hundred and twelve Euro (€237,312)."

109. The evidence in support of the cost of the removal as included in the main construction contract and of the actual removal is to be found mainly in Dr Zaffrani's first affidavit. Although Dr Zaffrani says that the obligation to remove the material was on the main contractor, and that it was removed in 2021, no supporting evidence of this was produced. Nor was any evidence of actual cost adduced, the argument being that the cost was subsumed into the overall cost of the contract. Moreover, that the material was in fact removed was not confirmed as a fact by Mr Sakarkan, the director of the contractor called to testify by PBL. Although he was not asked a specific question in this regard, he did refer to the (backfill) material on site as being at some +700mm above mean sea level, but he did not say what his company did with the material after it ran some tests and, after that, commenced piling.

110. PBL draws the conclusion that SCL's case on the actuality of damage suffered and, subsidiarily, its quantum (if damage is proved), has not been properly made out and ought to be dismissed. The Tribunal agrees. It was incumbent on SCL to prove that

the material was in fact removed. It is unclear that this in fact happened. The Tribunal finds it somewhat odd that SCL presented detailed evidence on all the other aspects of its case but could only, or chose only to, rely on Dr Zaffrani's somewhat vague assertions on this matter. Moreover, Mr Sakarkan's own testimony was inconclusive and leaves the Tribunal wondering whether the material was, perhaps, used for some other purpose. In light of this, the Tribunal finds that SCL has not demonstrated the removal of the material at a cost to it. Furthermore, even if there was a loss, the burden was on SCL to prove quantum and it has clearly failed to do so. That SCL intended to pursue a claim on the over-imported backfilling was clear since the middle of September of 2020. When SCL contracted with Mr Sakarkan's company is not recorded. All that is known (from his testimony) is that his company took over possession of the Site early in February 2021. The Tribunal infers from this that the relative contract would have been concluded a relatively short time before the taking over, which almost certainly was after September 2020. Given this it was within SCL's power and, one assumes, interest, to quantify the cost of the removal if, indeed, there was an obligation in this regard on the contractor. That SCL did not do so, either intentionally or unwittingly, is a fact, and it must bear the consequences, which are that this aspect of the claim must fail for this reason also.

111. If the Tribunal were to be wrong on either or both aspects dealt with above, the Tribunal would still consider this claim to be without foundation. PBL had offered to remove the excess backfill material during a meeting held on 29 March 2021. This offer was confirmed in writing by letter from PBL's lawyers dated 12 May 2021. It does not seem that this offer was refused. Rather it appears not to have been acted upon, perhaps for the reason suggested by Mr Polidano in his affidavit in relation to the counter-claims. Be that as it may, surely SCL had an obligation to minimize damages and could not sidestep this offer so easily particularly as - although it came rather late in the day - it should have been feasible to accept it.

<u>Other matters</u>

112. PBL's claim is for €550,186.99. Of this amount, €252,070.40 has been certified by QP Management and accepted as due by SCL (subject to any applicable set-off). This means that the amount contested by SCL is of €298,115.59. In his affidavit, Mr Elton Borg broke the difference down as follows:

		PBL	SHORELINE	DIFFERENCE
1.0	PRELIMINARIES			
	Preliminaries	€ 31,730	€ 18,948	-€ 12,782
3.0	EXCAVATION WORKS			
	General Excavation	€ 1,235,342	€ 1,160,830	-€ 74,512
	Loading, carting and dumping	€ 864,739	€ 812,581	-€ 52,158
	Excavate culvert		€ 3,492	+€ 3,492
4.0	DAYWORKS			
	Works to site boundary	€ 41,535	€ 36,065	-€ 5,470
5.0	VARIATIONS & ADDITIONS			
	Excavation below sea level	€ 170,188	€ 13,502	-€ 156,686
				-€ 298,116

113. On the other hand, Dr Zaffrani analysed the difference in the following terms:

		PBL	SCL	Difference	NOTES
1.0	Preliminaries	€ 31,730	€ 18,948	- €12,782	Due to re-measurable nature of the Contract
3.0	Excavation works	€1,973,411	€1,973,411	€ 0.00	Agreed
	Culvert excavation	€ 0.00	€ 3,492	+ € 3,492	Not considered by PBL

	Excavation works under sea level	€ 17,195.5	€ 8,597.75	- € 8,597.75	Same volume but QPM considered 50-50% split (included in PBL request under sect. 3.0 and in QPM IPC under 5.0)
	Additional volumes along NURR area "D-D'"	€ 4,904.50	€ 4,904.50	€ 0.00	Agreed (included in PBL request under sect. 3.0 and in QPM IPC under 5.0)
4.0	Dayworks	€ 36,065	€ 36,065	- € 0.00	Accepted by PBL on 08/07/2020 (see Annex VAZ.04)
5.0	Variations				
	Excavation below sea level	€ 168,188	€ 0,00	- € 168,188	See reasons above
	Plastic mesh to protect from felling down.	€ 2,000	€ 0.00	- € 2,000	Considered included in the general H&S obligations
	TOTAL	**€2,233,494**	**€2,045,418**	**-€ 188,076**	

Indeed, Dr Zaffrani concluded that the difference between the QP Management evaluation and PBL's claim is of €188,076 and not €298,116.

115. The Parties agree on what their differences are in respect of the Preliminaries (€12,782) and the Variations (the entire amount). In so far as the Variations are concerned, PBL's claim for excavation below sea level (€168,188) was dealt with under the section of this award dealing with the horizontal over-excavation. The claim for protection will be dealt with below, as will that for the Preliminaries.

116. There is then a discrepancy between them of €5,470 in respect of the dayworks; and a discrepancy of €104,570 on the excavation works proper. These too are dealt with below.

Preliminaries

117. Stephen Cachia provided a detailed explanation for the difference between the Parties in his affidavit. The explanations are detailed and rational – and even appear fair - and they have not been seriously rebutted. In his affidavit, Mr Elton Busuttil dedicates one generic paragraph to the matter, and he misrepresents QP Management's findings. Mr Cachia's explanation is accepted and PBL's claim will be reduced accordingly.

Dayworks

118. The issue in this regard concerns PBL's add-on for overheads and profit. Both of these are not recoverable, and so PBL's claim has to be reduced accordingly.

Protection

119. QP Management rejected this claim for €2,000 because the item, in their view, falls squarely within PBL's health and safety obligations. This seems to be an entirely rational explanation. PBL's claim will be reduced accordingly.

Excavation works

120. The total value of the dayworks as stated by Dr Zaffrani is explained in further detail by Stephen Cachia and appears to have been agreed by the Parties during a meeting held on 14 May 2020. Furthermore, SCL's position is consonant with the Tribunal's findings on the issues of both vertical and horizontal over-excavation.

121. SCL's calculation in this regard is therefore accepted, and PBL's claim will be reduced accordingly.

L-Appell

10. Fir-rikors tal-appell imressaq mis-soċjetà intimata, hawnhekk l-appellanta, fit-28 ta' Novembru, 2023, hija talbet lil din il-Qorti jogħġobha tilqa' l-aggravji mressqa minnha, u tgħaddi sabiex tordna lis-soċjetà appellata tħallas lis-soċjetà appellanta d-danni għad-dewmien kif mitluba fil-kontro-talba tagħha mingħajr ebda tnaqqis, kif ukoll sabiex tvarja dik il-parti tal-lodo arbitrali fejn is-soċjetà appellanta ġiet ordnata tirritorna lura lis-soċjetà appellata l-*performance security,* u tvarja l-proporzjon tal-ispejjeż relatati mal-kontro-talba, skont dak li jirriżulta li huwa xieraq għal din il-Qorti.

11. Is-soċjetà appellanta qalet li hija ħassitha ferm aggravata bil-parti tad-deċiżjoni tat-Tribunal li tinsab fil-paragrafu (e)(ii) tad-*decide,* u li permezz tagħha t-Tribunal attribwixxa biss €5,000 bħala *delay costs,* u konsegwentement hija tħossha aggravata wkoll bil-paragrafu (g) tad-deċiżjoni, fejn hija ġiet ordnata tħallas 80% tal-ispejjeż relatati mal-kontro-talba, filwaqt li s-soċjetà appellata ġiet ordnata tħallas biss 20% tal-imsemmija spejjeż, kif ukoll bil-parti tad-deċiżjoni f'paragrafu (b) fejn is-soċjetà appellanta ġiet ordnata tirritorna l-

performance security lura lis-soċjetà appellata. Is-soċjetà appellanta spjegat li huwa għalhekk li hija qiegħda tressaq appell mid-lodo arbitrali appellat limitatament fir-rigward ta' dawn il-partijiet tal-lodo arbitrali. Is-soċjetà appellanta qalet li t-Tribunal għamel interpretazzjoni u applikazzjoni skorretta tal-liġi kif applikabbli fil-kuntest tal-kuntratti mertu tal-kawża fir-rigward tal-ħlas tal-penali, u senjatament meta iddeċieda li fil-każ odjern għandu japplika l-artikolu 1122(1)(a) minflok l-artikolu 1122(1)(b) tal-Kap. 16, u konsegwentement għadda sabiex inaqqas u jtaffi l-penali kontrattwalment maqbula bejn il-partijiet. Is-soċjetà appellanta spjegat li hija ħassitha aggravata wkoll bil-parti tad-deċiżjoni fejn it-Tribunal naqqas il-penali b'mod simboliku għal ġurnata waħda, minflok ma applika l-artikolu 1122(2) tal-Kap. 16.

12. Is-soċjetà appellanta spjegat li r-relazzjoni kuntrattwali bejn il-partijiet hija regolata bit-termini u l-kundizzjonijiet stipulati fil-Kuntratt, li l-għan ewlieni tiegħu huwa li jirregola l-iskavar tas-sit għal-livelli maqbula, u sabiex jitnaddaf u jitneħħa l-materjal kollu fi żmien sebgħa u għoxrin (27) ġimgħa mid-data li jibdew ix-xogħlijiet. Is-soċjetà appellanta qalet li hija tistrieħ fuq il-fatti u l-kronoloġija kif riprodotti fin-nota ta' sottomissjonijiet tagħha. Qalet li permezz ta' ittra tal-24 t'April, 2019, il-partijiet qablu li x-xogħlijiet kellhom jibdew fid-29 t'April, 2019, u għalhekk ix-xogħlijiet kellhom jitlestew sat-3 ta' Novembru, 2019, liema data sussegwentement ġiet estiża sat-13 ta' Novembru, 2019. Qalet li mis-6 ta' Ġunju, 2019, hija bdiet tiġbed l-attenzjoni tas-soċjetà appellata li l-iskavar kien qiegħed jestendi lil hinn mill-konfini tas-sit in kwistjoni, u li s-soċjetà appellata kellha tirrettifika dan in-nuqqas billi tirripristina s-sit adjaċenti. Is-soċjetà appellanta qalet li x-xogħol goff ta' skavar tlesta għall-ħabta tat-8 ta'

Jannar, 2020, b'dan illi kien għad fadal xogħol rimedjali x'isir in konnessjoni mal-iskavar żejjed fis-sit, u dan sabiex l-appalt li kienet inkarigata tagħmel is-soċjetà appellata jitqies komplut skont il-Kuntratt. Is-soċjetà appellanta spjegat li wara li saru diversi laqgħat bejnha, is-soċjetà appellata, u SmartCity (Malta) Limited bil-għan li tinstab soluzzjoni għax-xogħol rimedjali li kellu jsir, fid-19 ta' Frar, 2020, is-soċjetà appellata ħarġet bil-proposta formali lil SmartCity (Malta) Limited sabiex jiġi rimedjat l-iskavar żejjed li kien sar. Is-soċjetà appellanta spjegat li fil-21 ta' Lulju, 2020, hija ħarġet ordni għal varjazzjoni skont il-parametri permessi fil-Kuntratt, sabiex is-soċjetà appellanta timporta bejn tliet elef metru kubu (3,000 m^3) u erbat elef metru kubu (4,000 m^3) ta' materjal sabiex ikunu jistgħu jipprovdu wiċċ stabbli, livellat u niexef, u dan sabiex kuntratturi terzi jkunu jistgħu jagħmlu testijiet ġeofiżiċi fuq is-sit. Is-soċjetà appellanta spjegat li l-Perit Darren Sciberras kien informa lis-soċjetà appellata li dan il-materjal kellu jilħaq livell ta' +0.2m jew (+ 200mm) 'il fuq mil-livell medju tal-baħar. Kompliet tgħid li s-soċjetà appellata impurtat materjal żejjed fis-sit, bil-konsegwenza li l-livelli topografiċi wara l-importazzjoni ta' materjal mis-soċjetà appellata, kienu jvarjaw bejn +580 mm 'il fuq mil-livell medju tal-baħar sa + 800 mm 'il fuq mil-livell medju tal-baħar. Is-soċjetà appellanta spjegat li permezz ta' ittra tal-15 ta' Settembru, 2020, hija talbet lis-soċjetà appellata tneħħi l-materjal kollu li kien jinsab 'il fuq mil-livell ta' 0.2 m (jew + 200mm) 'il fuq mil-livell medju tal-baħar. Is-soċjetà appellanta qalet li wara diversi komunikazzjonijiet bejn il-partijiet, irriżulta li s-soċjetà appellata la kienet fi ħsiebha tagħmel xogħol rimedjali sabiex tindirizza l-iskavar żejjed ġos-sit adjaċenti, u lanqas ma kien fi ħsiebha tneħħi l-materjal żejjed li impurtat. Qalet li konsegwentement, permezz ta' ittra tat-8 ta' Ottubru, 2020, is-soċjetà

appellanta talbet b'mod formali lis-soċjetà appellata twettaq ix-xogħlijiet rimedjali kollha li kienu neċessarji sabiex tiġi indirizzata l-kwistjoni tal-iskavar żejjed u t-tneħħija tal-materjal żejjed, u li fin-nuqqas ta' dan, is-soċjetà appellanta ma kienx ser ikollha alternattiva għajr li tingaġġa terza persuna sabiex tagħmel dawn l-istess xogħlijiet bi spejjeż tas-soċjetà appellata.

13. Is-soċjetà appellanta spjegat li peress li s-soċjetà appellata baqgħet tirrifjuta li tagħmel dak li ntalbet tagħmel, fid-29 ta' Ottubru, 2020, hija ħarġet '*Taking-Over Notice',* li permezz tiegħu infurmat lis-soċjetà appellata li *ai termini* tal-klawsola 8.2 tal-kundizzjonijiet ġenerali tal-Kuntratt, għalkemm ix-xogħlijiet ma kienux tlestew, is-soċjetà appellanta kienet ser tieħu lura l-pussess tas-sit in kwistjoni mid-data tal-istess avviż. Qalet li permezz tal-istess avviż, hija interpellat lis-soċjetà appellata sabiex fi żmien ħamest ijiem mid-data ta' dan l-avviż, tlesti x-xogħlijiet rimedjali li kellhom isiru minħabba l-iskavar żejjed fil-fond adjaċenti, u sabiex jitneħħa l-materjal żejjed li kien impurtat fis-sit. Kompliet tgħid li dan l-avviż intbagħat mingħajr ebda preġudizzju għal kwalsiasi drittijiet spettanti lis-soċjetà appellanta.

14. Is-soċjetà appellanta qalet li s-soċjetà appellata baqgħet inadempjenti, u għalhekk fis-17 ta' Frar, 2021, hija ħarġet *Notice of Default* fil-konfront tas-soċjetà appellata, li permezz tagħha infurmatha li *ai termini* tal-klawsola 12.1 tal-kundizzjonijiet ġenerali tal-Kuntratt, hija kienet naqset milli teżegwixxi x-xogħlijiet *ai termini* tal-Kuntratt, senjatament minħabba (i) skavar żejjed lil hinn mill-konfini tas-sit; (ii) importazzjoni żejda ta' materjal; (iii) dewmien fit-tlestija tax-xogħlijiet. L-appellanta qalet li s-soċjetà appellata ntalbet tieħu l-passi rimedjali kollha possibbli sabiex tirrimedja dawn in-nuqqasijiet fi żmien erbatax-

il jum min-notifika ta' dan l-avviż. Fin-nuqqas, is-soċjetà appellanta kienet qiegħda tirriserva li toħroġ avviż ta' terminazzjoni *ai termini* tal-klawsola 12.1 tal-Kuntratt, u titlob l-ammonti dovuti lilha *ai termini* tal-klawsola 7.4, 9.1 u 12.4 tal-Kuntratt. Is-soċjetà appellanta qalet li fl-24 ta' Marzu, 2021, hija kienet kostretta toħroġ Avviż ta' Terminazzjoni li permezz tiegħu kienet ttterminat b'mod formali l-Kuntratt bejn il-partijiet *ai termini* tal-klawsola 12.1. Żiedet tgħid li fl-istess waqt hija talbet lis-soċjetà appellata tħallas l-ammont li s-soċjetà appellanta kienet indikat fil-kontro-talba tagħha.

15. Is-soċjetà appellanta qalet li għalhekk it-Tribunal kien żbaljat meta applika l-artikolu 1122(1)(a) tal-Kap. 16 tal-Liġijiet ta' Malta, u mhux l-artikolu 1122(1)(b). Spjegat li fl-ewwel lok, dan il-punt ma kienx imqajjem bħala eċċezzjoni min-naħa tas-soċjetà appellata, u dan lanqas ma tressaq mis-soċjetà appellata bħala argument li abbaži tiegħu s-soċjetà appellata għamlet xi talba għal tnaqqis fil-penali dovuta. Is-soċjetà appellanta qalet li kien biss waqt it-trattazzjoni finali, li t-Tribunal talab lill-partijiet jagħmlu noti ta' referenzi dwar diversi punti relatati mal-artikolu 1122 tal-Kap. 16, fosthom dwar liema sub-artikolu għandu japplika fil-każ odjern. Is-soċjetà appellanta qalet li l-Kuntratt bejn il-partijiet kien jistipula li s-somma ta' ħamest elef Euro (€5,000) kienet dovuta għal kull ġurnata ta' dewmien. Hawnhekk l-appellanta għamlet riferiment għal dak li jipprovdi l-artikolu 1118 tal-Kodiċi Ċivili, li jistipula li l-klawsola penali hija dik li biha wieħed, sabiex jassigura l-eżekuzzjoni ta' ftehim, jobbliga ruħhu għal xi ħaġa fil-każ li jonqos li jeżegwih. Qalet li l-artikolu 1122 tal-Kodiċi Ċivili jistipula wkoll li bħala regola ġenerali, il-Qrati ma jistgħux inaqqsu jew itaffu l-penali, ħlief fil-każijiet hemmhekk elenkati. Hawnhekk is-

soċjetà appellanta qalet li t-Tribunal kien żbaljat meta ddeċieda li għandu japplika l-artikolu 1122(1)(a) tal-Kap. 16 tal-Liġijiet ta' Malta. Is-soċjetà appellanta qalet li hija mhux talli m'aċċettatx dan ix-xogħol, talli kienet kostretta li tieħu lura f'idejha s-sit in kwistjoni, u fil-fatt permezz tat-*Taking-Over Notice* infurmat lis-soċjetà appellata li l-istess soċjetà appellata kienet ser tinżamm responsabbli għax-xogħlijet rimedjali, ir-riskju tal-istess, il-prezz ta' dawn ix-xogħlijiet u l-ispejjeż relatati, u dan mingħajr preġudizzju għal kwalunkwe pretensjoni jew danni li s-soċjetà appellanta seta' kellha fil-konfront tas-soċjetà appellata. Is-soċjetà appellanta saħqet li interpretazzjoni kuntrarja għall-pożizzjoni tagħha, iġġib fix-xejn is-saħħa tal-klawsola penali għad-dewmien miftiehma legalment bejn il-partijiet. Is-soċjetà appellanta qalet li klawsola bħal din hija għal kollox indipendenti minn jekk ix-xogħlijiet in kwistjoni ġewx aċċettati *in parte* jew *in toto.* Qalet li l-uniku kriterju huwa d-dewmien fl-eżekuzzjoni tal-inkarigu pattwit, b'dan illi fl-ipoteżi li l-kuntrattur jeżegwixxi x-xogħlijiet fl-interità tagħhom u a sodisfazzjon tas-sid, iżda b'xi dewmien, il-kuntrattur xorta waħda jibqa' obbligat li jħallas lis-sid il-penali miftiehma għal kull ġurnata li l-kuntrattur ikun tard fl-eżekuzzjoni tax-xogħlijiet in kwistjoni.

16. Permezz tat-tieni aggravju tagħha, is-soċjetà appellanta qalet li t-Tribunal għamel applikazzjoni skorretta tal-artikolu 1122(2) tal-Kap. 16. Spjegat li jekk din il-Qorti tgħaddi biex taċċetta l-pożizzjoni li t-Tribunal kellu diskrezzjoni, minkejja dak espressament ipprovdut fil-liġi, li jnaqqas jew itaffi l-penali, it-Tribunal ma seta' qatt jgħaddi sabiex imewwet *arbitrio boni viri* l-effetti tal-klawsola tal-penali għad-dewmien għal ġurnata simbolika waħda. Is-soċjetà appellanta qalet li l-mitigazzjoni simbolika ma ssibx applikazzjoni fil-liġi

applikabbli, u semmai, minkejja dak premess fl-ewwel aggravju, jiġifieri li b'applikazzjoni tal-artikolu 1122(1)(b) tal-Kap. 16, it-Tribunal kien espressament preklużż milli jnaqqas jew itaffi l-penali maqbula u miftiehma bejn il-partijiet, kemm-il darba t-Tribunal kellu raġuni valida fil-liġi sabiex inaqqas jew itaffi l-penali, dan it-tnaqqis kellu jsir entro l-parametri u skont il-proċedura stabbilita fl-artikolu 1122(2) tal-Kap. 16. L-artikolu 1122(2) jistipula li meta l-penali tiġi mnaqqsa, it-tnaqqis għandu jsir fil-proporzjon tal-parti tal-obbligazzjoni li tkun baqgħet mhijiex esegwita, u skont diversi sentenzi tal-Qrati tagħna, il-Qorti għandha tieħu konsiderazzjoni tal-perċentwali tax-xogħlijiet li ma jkunux tlestew meta jkun hemm tnaqqis fil-penali. Is-soċjetà appellanta qalet li għalhekk għandu jirriżulta li t-Tribunal kien żbaljat meta ddeċieda b'mod arbitrarju li l-penali għad-dewmien li huma dovuti lilha għandhom jitnaqqsu għal €5,000, rappreżentanti l-penali dovuta għal ġurnata simbolika waħda.

<u>Ir-Risposta tal-Appell</u>

17. Fir-risposta tagħha, is-soċjetà appellata wieġbet li bl-appell tagħha, is-soċjetà appellanta qiegħda tistieden lil din il-Qorti tagħmel interpretazzjoni ta' fatti differenti minn dik li għamel l-Arbitru, hekk kif l-Arbitru ikkonkluda li s-soċjetà appellata kienet eżegwiet parti mill-obbligazzjoni u s-soċjetà appellanta kienet aċċettat il-parti li ġiet eżegwita b'mod espress, u għaldaqstant l-Arbitru għadda għall-mitigazzjoni tal-penali maqbula a tenur tal-paragrafu (a) tal-artikolu 1122 (1) tal-Kap. 16. Qalet li għaldaqstant l-appell għandu jitqies li huwa insostenibbli. Spjegat li fil-mument li fuq kwistjoni ta' fatt, it-Tribunal iddeċieda li jqis li s-soċjetà appellata kienet eżegwiet parti mill-obbligazzjoni, u s-soċjetà

appellanta aċċettat espressament il-parti li ġiet eżegwita, u għalhekk applika d-dispost tal-artikolu 1122(1) tal-Kap. 16 u impona biss penali simbolika, l-Arbitru kien qiegħed jeżerċita d-diskrezzjoni tiegħu li ġudikant huwa munit biha, a tenur tal-imsemmi artikolu, u abbażi tal-fatti li kellu quddiemu. Is-soċjetà appellata qalet li għalhekk iż-żewġ aggravji huma insostenibbli.

18. B'riferiment għall-ewwel aggravju sollevat mis-soċjetà appellanta, is-soċjetà appellata qalet li l-eċċezzjonijiet ikkontemplati fl-artikolu 1122 tal-Kap. 16 u li abbażi tagħhom ġudikant ikun jista' jtaffi l-penali skont kif ipprovdut fis-subinċiż (2) tal-istess artikolu, huma alternattivi għal xulxin u mhux kumulattivi. Spjegat li dan ifisser għalhekk li ż-żewġ dispożizzjonijiet għandhom jiġu interpretati u applikati separatament u indipendentement minn xulxin. Is-soċjetà appellata qalet li bħala fatt hija kienet eżegwiet parti mill-obbligazzjoni, u s-soċjetà appellata aċċettat il-parti li ġiet eżegwita, fatt li ġie aċċettat ukoll mill-Arbitru, u għalhekk kellha tapplika l-klawsola li tippermetti ġudikant itaffi penali miftiehma, kif fil-fatt sar f'dan il-każ, anki jekk għas-saħħa tal-argument, il-penali miftiehma kienet għad-dewmien biss.

19. Is-soċjetà appellata qalet li fil-każ ta' dak dispost fil-paragrafu (b) tal-artikolu 1122 tal-Kap. 16, anke moqri flimkien ma' dak dispost fil-paragrafu (a) tal-artikolu 1122 tal-Kap. 16, l-eċċezzjoni kkontemplata hawnhekk tippermetti lill-ġudikant itaffi l-penali wara li d-debitur ikun eżegwixxa biss parti mill-obbligazzjoni, u l-parti hekk eżegwita, meta jitqiesu ċ-ċirkostanzi partikolari tal-kreditur, tkun biċ-ċar tiswielu, mingħajr ma l-kreditur ikun aċċetta espressament dik il-parti esegwita, sakemm fil-każ biss ikkontemplat fil-paragrafu (b) tal-artikolu 1122 tal-Kap. 16, il-partijiet ma jkunux ftiehmu fuq

penali għal 'dewmien biss', konsiderazzjoni li l-leġislatur ma jagħmilx f'dak dispost fil-paragrafu (a) tal-artikolu 1122 tal-Kap. 16. Is-soċjetà appellata qalet li anke jekk għas-saħħa tal-argument, il-penali miftiehma bejn il-partijiet kienet għad-dewmien biss, l-Arbitru kien korrett li jtaffi l-penali skont dak dispost fil-paragrafu (a) tal-artikolu 1122 tal-Kap. 16. Kien in vista ta' dawn il-konsiderazzjonijiet li l-Arbitru ddeċieda li s-sub-artikolu (b) tal-artikolu 1122 tal-Kap. 16 ma jsib l-ebda applikazzjoni fiċ-ċirkostanzi ta' dan il-każ. Is-soċjetà appellata żiedet tgħid li hemm ġurisprudenza awtorevoli li tgħid li anki fejn hemm stipulata penali għad-dewmien, it-tnaqqis huwa possibbli.

20. Is-soċjetà appellata għamlet riferiment għall-parti tar-rikors tal-appell fejn is-soċjetà appellanta għamlet riferiment għat-*Taking Over Notice* li biha ħadet pussess tas-sit, u qalet li bħala stat ta' fatt jidher li l-Arbitru ma kellu l-ebda dubju li dan il-proċess kien ifisser li s-soċjetà appellanta kienet aċċettat espressament ix-xogħlijiet li s-soċjetà appellata kienet wettqet, li wara kollox kienu konklużi fl-intier tagħhom, salv għal xogħol rimedjali li għalih l-Arbitru ddeċieda li kellu jkun hemm tnaqqis fl-ammonti dovuta lis-soċjetà appellata. Is-soċjetà appellata qalet li anki jekk il-kreditur jagħmel riservi, iżda jaċċetta x-xogħol, huwa l-paragrafu (a) tal-artikolu 1122 tal-Kap. 16 li japplika. Qalet li fil-każ odjern is-soċjetà appellanta ma rrifjutatx ix-xogħol, u aċċettat ix-xogħol li ġie pprestat mis-soċjetà appellata. Żiedet tgħid li jeżistu sentenzi storiċi fejn il-Qrati tagħna bbażaw ruħhom fuq kunċetti ġenerali ta' ekwità u *bona fide* biex jintervjenu u jtaffu l-klawsola penali, anki meta din tkun ġiet miftiehma għal sempliċi dewmien. Qalet li dan jingħad partikolarment b'riferiment għat-tieni aggravju mqajjem mis-soċjetà appellanta, fejn din tilmenta li l-Arbitru naqqas il-

penali arbitrarjament, u bla preġudizzju għall-pożizzjoni tas-soċjetà appellata li dan l-aggravju huwa insostenibbli għaliex is-soċjetà appellanta qiegħda tinsisti li din il-Qorti tagħmel konsiderazzjonijiet ta' fatt li diġà saru mill-Arbitru. Qalet li b'mod ġenerali, il-Qrati huma aktar disposti li jiddeċiedu fuq il-bażi tat-teorija tal-*bona fide* meta jiddeterminaw jekk il-klawsoli penali għandhomx jitnaqqsu jew le, irrispettivament minn dak miftiehem espressament bejn il-partijiet kontraenti. Qalet li jidher li kien dan il-prinċipju li nebbaħ lill-Arbitru jtaffi l-penali mitluba għal €5,000, u dan ikkunsidra l-fatt li matul l-2020 is-soċjetà appellanta qagħdet lura u ma ressqet l-ebda pretensjoni, u l-Arbitru kkunsidra wkoll li l-ebda danni ma ġew sofferti minħabba dan id-dewmien. Is-soċjetà appellata qalet li anke li kieku wieħed kellu jinjora l-prinċipju tal-ekwità, u japplika b'mod strett l-artikolu 1122(2) tal-Kap. 16, mill-provi jirriżulta li l-kwistjoni tad-dewmien u tal-penali konsegwenzjali kkontemplati fil-kuntratt, feġġet biss meta x-xogħlijiet kienu ilhom li ġew mitmuma, u s-soċjetà appellata kienet qiegħda titlob ħlas b'mod leġittimu, u s-soċjetà appellanta bdiet tirreżisti dan billi ressqet ċerti pretensjonijiet, li ċertament kienu pre-eżistenti, bħall-kwistjoni tat-tħaffir żejjed u l-importazzjoni żejda tal-materjal, u t-talba għall-penali għad-dewmien saret biss meta s-soċjetà appellanta ħadet is-sit f'idejha. Is-soċjetà appellata qalet li f'dan il-punt il-ħlasijiet kienu qegħdin jiġu ċċertifikati u jsiru mingħajr ebda kwalifika, ħlief li s-soċjetà appellanta kienet qiegħda tressaq pretensjonijiet biss għal ċerti kwistjonijiet li mhumiex il-mertu ta' dan l-appell, u mhux danni għad-dewmien. Is-soċjetà appellata qalet li s-soċjetà appellanta ma kienitx qiegħda taġixxi *in buona fede* fir-rigward tat-talba tal-penali għad-dewmien. Qalet li kien biss mill-iskambji ta' korrispondenza li seħħew wara li r-relazzjoni bejn il-kontraenti ħżienet, li s-soċjetà appellata qalet

wara li ġie konkluż it-tħaffir u tlesta x-xogħol kollu, li kien hemm waqfiet twal fil-proġett, deċiżi mis-soċjetà appellanta, u li għalihom ma setgħetx tinżamm responsabbli is-soċjetà appellata. Qalet li minflok, is-soċjetà appellanta qiegħda titlob ukoll danni għall-perijodu *interim* bejn it-tlestija tax-xogħlijiet u t-teħid tal-pussess tas-sit.

21. Is-soċjetà appellata qalet li f'dan il-kuntest irid jingħad li anke qabel bdew ix-xogħlijiet, diġà kien hemm dewmien ta' numru ta' jiem sabiex inħarġu l-istruzzjonijiet mir-rappreżentanti tas-soċjetà appellanta, u kien hemm element ta' turpitudni mis-soċjetà appellanta, bħal meta l-periti mqabbda minnha kienu jdumu ġimgħat, jekk mhux xhur, biex joħorġu struzzjoni formali, u s-soċjetà appellanta qiegħda tipprova tieħu vantaġġ mill-passività tagħha. Is-soċjetà appellata qalet li fil-verità qatt ma kien hemm kwistjoni ta' dewmien bejn il-partijiet, l-ebda sens ta' urġenza, u l-partijiet dejjem implimentaw id-dispożizzjonijiet tal-Kuntratt ta' bejniethom b'kooperazzjoni, anki meta bejn il-partijiet inqalgħu problemi tekniċi. Is-soċjetà appellata qalet li anke fl-istadju tat-teħid tal-pussess tas-sit mis-soċjetà appellanta, kien għad m'hemmx sens ta' urġenza, peress li l-kuntrattur tal-bini ma kienx għadu ħa pussess tas-sit, u ma kienx ser jagħmel dan qabel Frar tal-2021, sabiex eventwalment beda x-xogħol f'Mejju tal-2021. Is-soċjetà appellata qalet ukoll li x-xogħlijiet li hija ġiet ikkuntrattata għalihom, jiġifieri x-xogħlijiet ta' tħaffir, tlestew ftit jiem biss wara l-iskadenza stipulata fil-kuntratt oriġinarjament, u li kien għad fadal kienu xogħlijiet rimedjali li fil-fatt hija ġiet ordnata tħallas tagħhom bid-deċiżjoni tal-Arbitru. Is-soċjetà appellata qalet li f'dan is-sens ukoll, l-ebda danni ma ġew arrekati lis-soċjetà appellanta, u jekk ġew arrekati, din ser titħallas tagħhom. Is-

soċjetà appellata qalet li meta kien konvenjenti għas-soċjetà appellanta li toħroġ *Certificate of Taking-Over,* dan sar fid-29 ta' Ottubru, 2020, u mhux b'mod inċidentali, u kien hawnhekk li s-soċjetà appellanta bdiet titlob il-ħlas tal-penali għall-allegat dewmien, minkejja li hija ma sofriet l-ebda danni f'dan ir-rigward.

Konsiderazzjonijiet ta' din il-Qorti

22. Din il-Qorti sejra tgħaddi sabiex tikkunsidra l-aggravji mressqa mis-soċjetà appellanta fir-rikors tal-appell tagħha, u dan fid-dawl tal-konsiderazzjonijiet magħmula mit-Tribunal fil-lodo arbitrali appellat, u tas-sottomissjonijiet magħmula mis-soċjetà appellata. B'riferiment speċifiku għall-eċċezzjoni sollevata mis-soċjetà appellata, li l-appell in kwistjoni huwa inammissibbli għaliex ma sarx fuq punt ta' liġi, il-Qorti tagħmel riferiment għal dak deċiż minn din il-Qorti diversament preseduta, fis-sentenza fl-ismijiet **Maryanne Scicluna *vs.* Dr Daniela Chetcuti**[1], fejn ġie osservat is-segwenti:

> *"Opportunement, għandu jiġi puntwalizzat illi għalkemm din il-Qorti hi konstentita kontroll fuq il-mertu tal-ġudizzju, fl-istess waqt m'għandhiex ukoll il-kompetenza tar-ri-eżami tal-fatti tal-każ. Effettivament, l-eżami u valutazzjoni ta' dawk il-fatti u tal-provi huma* di diritto *riservati lill-Arbitru u dawn ma humiex ċensurabbli f'din is-sede. Mhux allura ammissibbli li quddiem din il-Qorti ta' reviżjoni tinġieb kontestazzjoni tal-valutazzjoni tar-riżultanzi probatorji akkwiżiti fil-proċediment arbitrali. Jekk hemm bżonn jiġi ripetut, ir-raġuni għal dan tipprovdiha l-istess liġi bil-limitazzjoni prospettata fl-Artikolu 70A(1), ampjament surriferit;*
>
> *Akkoppjat ma' dan, imbagħad, hemm id-dettam tal-Artikolu 70B(1) li jipprovdi li meta jsir appell taħt l-Artikolu 70A l-appellant għandu jidentifika l-punt ta' liġi li għandha tittieħed deċiżjoni fuqu u għandu jispeċifika t-tifsira li r-rikorrenti jallega li hi t-tifsira*

[1] 14.03.2007.

korretta tal-punt ta' liġi identifikat. Jikkonsegwi minn dan illi hu dejjem neċessarju li mill-att tal-appell jirriżulta liema hi n-norma vjolata ossija l-prinċipju tad-dritt li l-appellanti jippretendi li ġie leż. Li jfisser illi min jimpunja d-deċiżjoni għandu jispeċifika, fil-konkret, il-punt ta' liġi vjolat, u in aġġunta jġib in riljev il-punt u l-mod fejn l-Arbitru ddiskosta ruħhu minnu. Irid jiżdied illi mhux suffiċjenti s-sempliċi kritika tad-deċiżjoni sfavorevoli formulata bi prospettazzjoni ta' interpretazzjoni diversa u aktar favorevoli minn dik adottata mill-Arbitru. Dan, għaliex kritika f'din id-direzzjoni ma tistax ħlief tittraduċi ruħha, in sostanza għal talba tal-aċċertament ex novo tal-fatti tal-każ u dan, kif ġia rilevat, hu inammissibbli."

23. Il-Qorti tirrileva li l-aggravji tas-soċjetà appellanta essenzjalment huma dwar liema sub-artikolu tal-liġi għandu japplika għaċ-ċirkostanzi tal-każ odjern, u jekk l-Arbitru kellux id-diskrezzjoni li jillikwida ammont ta' danni *arbitrio boni viri,* lil hinn minn dak strettament pattwit fil-Kuntratt bejn il-kontraenti. Is-soċjetà appellanta tispjega li hija ħassitha aggravata għaliex fil-fehma tagħha kien hemm interpretazzjoni u applikazzjoni skorretta dwar il-liġi applikabbli fil-kuntest attwali, speċjalment fil-parti tal-lodo fejn it-Tribunal iddeċieda li fil-każ odjern għandu japplika l-artikolu 1122(1)(a) tal-Kodiċi Ċivili minflok is-sub-inċiż (1)(b) tal-istess artikolu.

24. Għaldaqstant, il-Qorti tqis li l-aggravji tas-soċjetà appellanta huma bbażati fuq punt ta' liġi *ai termini* ta' dak li jipprovdi l-artikolu 70B tal-Kap. 387 tal-Liġijiet ta' Malta, u l-Qorti għandha l-kompetenza meħtieġa sabiex tagħmel il-konsiderazzjonijiet tagħha fir-rigward tal-aggravji mressqa mis-soċjetà appellanta. Il-Qorti tirrileva wkoll li minkejja li s-soċjetà appellanta qiegħda effettivament tagħmel tliet talbiet distinti bir-rikors tal-appell tagħha, jiġifieri sabiex is-soċjetà appellata tiġi ordnata tħallasha l-penali għad-dewmien kif mitluba fil-kontro-talba tagħha, mingħajr ebda tnaqqis; sabiex il-Qorti tvarja l-parti tal-lodo appellat fejn hija ġiet ordnata tirritorna il-garanzija tal-

prestazzjoni skont il-Kuntratt; u sabiex il-Qorti tvarja l-proporzjon tal-ispejjeż marbuta mal-kontro-talba, l-aggravji tagħha huma mibnija biss fuq il-kwistjoni dwar jekk it-Tribunal għamilx applikazzjoni korretta tal-artikolu 1122(1)(a), jew inkella kellux japplika l-artikolu 1122(1)(b) tal-Kodiċi Ċivili, u fuq il-kwistjoni dwar jekk it-Tribunal setax jimmitiga jew inaqqas *arbitrio boni viri* il-penali għad-dewmien. L-ebda dettall ulterjuri ma ngħata mis-soċjetà appellanta dwar il-kumplament tal-pretensjonijiet tagħha, minkejja li huwa evidenti li t-talbiet imressqa fir-rikors tal-appell tagħha huma konsegwenzjali għad-deċiżjoni li ser tingħata minn din il-Qorti fir-rigward tal-aggravji sollevati minnha.

L-Ewwel Aggravju: *[Is-sub-artikolu 1122 sub-inċiż (1) tal-Kap. 16 applikabbli għaċ-ċirkostanzi tal-każ]*

25. Is-soċjetà appellanta tgħid li t-Tribunal kien żbaljat meta kkunsidra li kellu japplika l-artikolu 1122(1)(a) minflok l-artikolu 1122(1)(b) tal-Kodiċi Ċivili. Tispjega li skont il-ftehim bejn il-partijiet, ix-xogħol kellu jitlesta fi żmien sebgħa u għoxrin (27) ġimgħa, u bejn il-partijiet kien hemm qbil li x-xogħol ta' skavar fuq is-sit kellu jibda fid-29 ta' April, 2019, u jitlesta sat-3 ta' Novembru, 2019, u eventwalment is-soċjetà appellata ngħatat estensjoni ta' għaxart ijiem fuq it-terminu oriġinali konċess, sabiex b'hekk ix-xogħol ta' skavar kellu jitlesta sat-13 ta' Novembru, 2019. Is-soċjetà appellanta tgħid li l-kwistjoni bejn il-partijiet inqalgħet għaliex is-soċjetà appellata għamlet xogħol ta' skavar żejjed kemm fil-linja vertikali, kif ukoll fil-linja orizzontali, u hija kienet ilha li ġibdet l-attenzjoni dwar dan mis-6 ta' Ġunju, 2019, u kienet ilha minn dak iż-żmien titlob li s-sit jiġi ripristinat. Qalet li x-xogħol ta' skavar kien lest sat-8 ta' Jannar, 2020, iżda kien

għad fadal xogħol rimedjali x'isir mis-soċjetà appellata, fosthom billi s-soċjetà appellata ntalbet timporta għadd ta' materjal sabiex is-sit ikun jista' jiġi mwitti u l-iskavar żejjed li sar jiġi rimedjat. Qalet li minkejja li l-irdim sabiex jiġi rimedjat l-iskavar żejjed li sar, kellu jestendi biss sa 0.2 metri 'il fuq mil-livell tal-baħar, is-soċjetà appellata tefgħet materjal żejjed b'tali mod li telgħet bejn 0.580m u 0.80m 'il fuq mil-livell tal-baħar, u għalhekk fil-15 ta' Settembru, 2020 is-soċjetà appellanta għamlet talba formali sabiex is-soċjetà appellata tneħħi l-materjal żejjed mitfugħ minnha. Is-soċjetà appellanta qalet li eventwalment hija ġiet a konoxxenza tal-fatt li s-soċjetà appellata ma kienx fi ħsiebha tagħmel ix-xogħol rimedjali meħtieġ sabiex tirripristina s-sit, u għalhekk fid-29 ta' Ottubru, 2020 hija bagħtet *Taking-Over Notice* li permezz tagħha infurmat lis-soċjetà appellata li hija kienet ser tieħu s-sit f'idejha għalkemm ikkonċediet terminu ta' ħamest ijiem lis-soċjetà appellata sabiex din tagħmel ix-xogħol rimedjali meħtieġ.

26. Is-soċjetà appellanta qalet li s-soċjetà appellata ma ressqet l-ebda eċċezzjoni, u m'għamlet l-ebda talba għal tnaqqis fil-penali imposta, u spjegat li skont il-Kuntratt, il-penali miftiehma hija ta' €5,000 għal kull ġurnata ta' dewmien. Qalet li bħala regola ġenerali, il-Qrati ma jistgħux itaffu jew inaqqsu l-penali miftiehma, u l-ftehim bejn il-partijiet kellu jiġi onorat – *pacta sunt servanda.* Il-punt ewlieni li qanqlet is-soċjetà appellanta f'dan l-aggravju tagħha, huwa li hija m'aċċettatx ix-xogħol li kien sar mis-soċjetà appellata, u għalhekk il-klawsola dwar il-penali għal dewmien kellha tiġi applikata fl-intier tagħha, irrispettivament minn jekk l-appellata kienitx lestiet ix-xogħol kollu jew le.

27. Il-Qorti tibda billi tagħmel riferiment għal dak li jipprovdi l-artikolu 1120 tal-Kodiċi Ċivili li jgħid hekk:

"(1) Il-penali hija l-kumpens tal-ħsara li jbati l-kreditur minħabba n-nuqqas tal-esekuzzjoni tal-obbligazzjoni prinċipali.

(2) Il-kreditur jista' jaġixxi għall-esekuzzjoni tal-obbligazzjoni prinċipali minflok ma jitlob il-penali li fiha jkun waqa' d-debitur.

(3) Hu ma jistax jitlob il-ħaġa prinċipali u l-penali flimkien, ħlief meta l-penali tkun ġiet miftiehma għad-dewmien biss."

28. L-artikolu 1122 tal-Kodiċi Ċivili imbagħad jistipula illi:

"(1) Il-qorti ma tistax tnaqqas jew ittaffi l-penali ħlief f'dawn il-każijiet:

(a) Jekk id-debitur ikun esegwixxa parti mill-obbligazzjoni, u l-kreditur ikun aċċetta espressament il-biċċa li ġiet esegwita;

(b) Jekk id-debitur ikun esegwixxa parti mill-obbligazzjoni u l-parti hekk esegwita, meta jitqiesu ċ-ċirkostanzi partikolari tal-kreditur, tkun biċ-ċar tiswielu. Iżda, f'dan il-każ, ebda tnaqqis ta' penali ma jista' jsir, jekk id-debitur, meta ntrabat għall-penali, ikun irrinunzja espressament għal kull tnaqqis jew jekk il-penali tkun ġiet miftiehma għad-dewmien biss."

29. Is-soċjetà appellanta tikkontendi li t-Tribunal kellu japplika l-artikolu 1122(1)(b) tal-Kap. 16 'il għaliex anki jekk jirriżulta li s-soċjetà appellata laħqet eżegwiet xi xogħol, jew saħansitra x-xogħol kollu kemm hu, it-Tribunal ma setax inaqqas il-penali ladarba s-soċjetà appellata kienet tardiva fl-eżekuzzjoni tax-xogħol tagħha, u l-penali tkun ġiet miftiehma għad-dewmien biss. Tgħid li t-Tribunal ma kellux japplika s-sub-inċiż 1122(1)(a) tal-Kap. 16 għaċ-ċirkostanzi tal-każ odjern, għaliex hija fl-ebda waqt ma aċċettat espressament ix-xogħol li ġie esegwit.

30. Il-Qorti tirrileva li s-soċjetà appellanta fl-ebda waqt ma jirriżulta li rrifjutat ix-xogħol esegwit mis-soċjetà appellata, u din talbet biss modifika jew korrezzjoni tax-xogħol li kien laħaq sar għaliex kien sar skavar żejjed fis-sit, kif

ukoll għaliex jirriżulta li ntefa' wkoll materjal żejjed meta s-soċjetà appellata ttentat tirrimedja l-iskavar żejjed li kien sar minnha. Il-Qorti tirrileva wkoll li l-obbligazzjoni prinċipali li s-soċjetà appellata ġiet ikkontrattata għaliha, jiġifieri, l-iskavar tas-sit, sar kollu kemm hu, u dan ix-xogħol mhux biss kien ta' siwi għas-soċjetà appellanta, iżda ġie wkoll aċċettat minnha. Fil-fatt kien laħaq għadda ammont konsiderevoli ta' żmien bejn it-talbiet li saru mis-soċjetà appellanta sabiex isir ix-xogħol rimedjali, u t-*Taking Over* tal-pussess tas-sit mis-soċjetà appellata, meta eventwalment iddeċidiet li tinkariga lil terzi sabiex jagħmlu x-xogħlijiet rimedjali meħtieġa minnha. Tqis li kien korrett l-Arbitru fit-*time-line* li għamel sabiex juri f'liema waqt is-soċjetà appellanta bdiet tinvoka l-klawsola tal-penali għad-dewmien, u dan in vista tal-fatt li għal perijodu ta' kważi sena, hija ddelegat lis-soċjetà QP Management tinnegozja mas-soċjetà appellata dwar punti speċifiċi in konnessjoni max-xogħol rimedjali meħtieġ, filwaqt li kien biss fit-8 ta' Ottubru, 2020, jiġifieri ħdax-il xahar wara li suppost kellu jitlesta x-xogħol ta' skavar kif maqbul oriġinarjament, li s-soċjetà appellanta talbet lis-soċjetà appellata tiddikjara b'mod formali jekk kienitx fi ħsiebha tagħmel ix-xogħol rimedjali meħtieġ minnha. Fid-29 ta' Ottubru, 2020, imbagħad, is-soċjetà appellanta ħarġet it-*Taking-Over Notice* li permezz tiegħu infurmat lis-soċjetà appellata li kienet ser tieħu lura s-sit f'idejha. L-ewwel darba li s-soċjetà appellanta semmiet il-penali minħabba dewmien, kien f'Novembru tal-2020. Il-Qorti għalhekk tqis l-imġiba tas-soċjetà appellanta f'dan il-perijodu kollu, ma kienitx kongruwa ma' sitwazzjoni fejn ix-xogħol esegwit mill-parti kontraenti l-oħra ma ġiex aċċettat b'mod espress, anzi kollox jindika li mhux talli x-xogħol esegwit ġie aċċettat, talli ġie stabbilit li kien hemm skavar żejjed li sar, u lil hinn mill-kwistjoni dwar min kien responsabbli li ġara dan, is-soċjetà appellanta

talbet li dan jiġi rimedjat. Fil-fatt is-soċjetà appellata bdiet tirrimedja għal dan ix-xogħol ta' skavar żejjed, imma tefgħet materjal iktar milli kien meħtieġ, bil-konsegwenza li minħabba f'hekk ukoll kien meħtieġ li jsir xogħol rimedjali fuq is-sit. Kien biss meta kien ċar li s-soċjetà appellata ma kienitx disposta li tkompli bix-xogħol rimedjali li ntalbet tagħmel, li s-soċjetà appellanta bagħtet it-*Taking-Over Notice* sabiex tinnotifika lis-soċjetà appellata b'mod formali li kienet qiegħda tieħu lura l-pussess tas-sit, filwaqt li ttemmet l-inkarigu li kellha s-soċjetà appellata. Imma s-soċjetà appellanta kkonċediet terminu ta' ħamest ijiem sabiex is-soċjetà appellata tagħmel ix-xogħol rimedjali kollu meħtieġ minnha. Din il-Qorti taqbel mal-konklużjoni tat-Tribunal li s-soċjetà appellanta aċċettat b'mod espress ix-xogħol ipprestat mis-soċjetà appellanta, tant hu hekk li insistiet fuq it-tkomplija tax-xogħlijiet rimedjali li kienu meħtieġa, u għalhekk kien korrett it-Tribunal meta applika l-artikolu 1122 (1)(a) tal-Kap. 16 għaċ-ċirkostanzi tal-każ odjern. Il-Qorti tirrileva wkoll li huwa biss is-sub-inċiż (1)(b) tal-artikolu 1122 tal-Kap. 16 li jgħid li ma jista' jsir l-ebda tnaqqis tal-penali meta din tkun miftiehma għal dewmien biss. Is-sub-inċiż (1)(a) tal-artikolu 1122 tal-Kap. 16 ma fih l-ebda klawsola simili li tgħid li ma jista' jkun hemm l-ebda tnaqqis tal-penali meta din tkun miftiehma għal dewmien biss. Għaldaqstant il-Qorti tqis li t-Tribunal kien korrett kemm fl-applikazzjoni tas-sub-inċiż 1122(1)(a) tal-Kodiċi Ċivili, kif ukoll fl-interpretazzjoni li tal-istess sub-inċiż, u għalhekk il-Qorti tqis li l-ewwel aggravju mhuwiex mistħoqq, u tiċħdu.

It-Tieni Aggravju: *[Applikazzjoni skorretta tas-sub-artikolu 1122(2) tal-Kodiċi Ċivili]*

31. Is-soċjetà appellanta qalet li t-Tribunal kien żbaljat ukoll meta mewwet l-effetti tal-klawsola għal penali għad-dewmien fl-eżekuzzjoni tal-inkarigu, għal *'a symbolic delay of 1 day'*, u attribwixxa biss ħamest elef Euro (€5,000) bħala *delay costs*. Qalet li dan sar bi ksur ta' dak li jipprovdi s-sub-inċiż (2) tal-artikolu 1122 tal-Kap. 16, li jgħid illi:

> "(2) Meta skont dan l-artikolu l-penali għandha tiġi mnaqqsa, it-tnaqqis għandu jsir fil-proporzjon tal-parti tal-obbligazzjoni li tkun baqgħet mhux esegwita."

32. Is-soċjetà appellanta tgħid li t-Tribunal ma setax ikun daqstant liberali fid-diskrezzjoni li uża meta dan mewwet għal kollox l-effetti tal-klawsola penali, u stabbilixxa penali simbolika ekwivalenti għal ġurnata waħda ta' dewmien. Il-Qorti mhijiex ser tidħol fil-konsiderazzjonijiet li għamel it-Tribunal sabiex wasal għall-konklużjoni li l-penali għandha tkun ta' ħamest elef Euro (€5,000), li hija l-penali miftiehma bejn il-partijiet għal kull ġurnata ta' dewmien fl-eżekuzzjoni tal-kuntratt. Imma l-Qorti tiġbed l-attenzjoni tal-partijiet għal dak li fil-fehma tagħha, huwa l-aktar punt kruċjali f'din il-kwistjoni kollha. Il-partijiet kontraenti kienu stipulaw fil-Kuntratt, li kwalsiasi tilwima li temani mill-Kuntratt kellha tiġi riżolta quddiem iċ-Ċentru dwar l-Arbitraġġ, minn Arbitru wieħed, kif fil-fatt ġara. Ir-raġunijiet għalfejn partijiet kontraenti jistgħu jiddeċiedu u jaqblu li għandhom jirreferu t-tilwim ta' bejniethom għal proċeduri arbitrali, jistgħu ikunu varji, mhux l-inqas sabiex jiġi evitat id-dewmien reali jew perċepit fi proċeduri ġudizzjarji, sabiex f'arbitraġġ il-partijiet ikunu aktar liberi li jirregolaw il-proċedura, u sabiex jiġi applikat il-prinċipju tal-ekwità, li fuqu hija bbażata s-sistema ta' riżoluzzjoni ta' tilwim fi proċeduri arbitrali. Dan ifisser li l-Arbitru kien obbligat li jiddeċiedi l-vertenza li kellu quddiemu skont il-prinċipji tal-ekwità,

wara li jevalwa l-provi kollha li kellu quddiemu, wara li analizza l-provi u wara li eżamina x-xhieda u dak li kellhom xi jgħidu l-partijiet. Kien hawnhekk fejn l-Arbitru eżerċita d-diskrezzjoni tiegħu, u ddeċieda li fi spirtu ta' ekwità, il-penali għad-dewmien għandha tkun ta' ħamest elef Euro (€5,000), wara li qies li kien hemm dewmien simboliku in vista tad-diversi diffikultajiet li kien hemm biex l-obbligazzjoni tiġi esegwita fil-ħin. Is-soċjetà appellata mill-ewwel laqgħet għall-kontro-talba tas-soċjetà appellanta, billi qalet li l-penali li qiegħda titlob mingħandha s-soċjetà appellanta hija prattikament għall-valur kollu tal-proġett, li b'kollox sewa ftit aktar minn żewġ miljun Euro. L-Arbitru qies ukoll li s-soċjetà appellanta għamlet sena jew ħdax-il xahar li matulhom qagħdet lura milli tikkomunika mas-soċjetà appellata, u l-interpellazzjonijiet sabiex isir ix-xogħlijiet rimedjali saru minn QP Management u mhux mis-soċjetà appellanta. Kien biss meta kien evidenti li s-soċjetà appellata ma kienitx ser tagħmel aktar xogħol fuq is-sit, li s-soċjetà appellanta innotifikatha formalment bid-deċiżjoni li tieħu s-sit lura f'idejha u li tinkariga terzi sabiex jagħmlu x-xogħlijiet rimedjali meħtieġa. Il-Qorti hawnhekk ma ssib xejn x'tiċċensura fil-konsiderazzjonijiet li għamel l-Arbitru rigward il-mod kif wasal għall-penali li għandha titħallas, u għaldaqstant qiegħda tikkonferma fl-intier tagħhom il-partijiet tal-*lodo* li s-soċjetà appellanta qiegħda tappella minnhom.

<u>Decide</u>

Għar-raġunijiet premessi, il-Qorti qiegħda taqta' u tiddeċiedi dwar l-appell odjern billi tiċħdu, u tikkonferma fl-intier tagħhom il-partijiet tal-*lodo* arbitrali li minnhom appellat is-soċjetà appellanta.

L-ispejjeż tal-proċeduri quddiem l-Arbitru għandhom jibqgħu kif deċiżi, filwaqt li l-ispejjeż ta' dan l-appell huma a karigu tas-soċjetà appellanta.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur